

DR. BURN'S

LAW DICTIONARY.

VOL. I.



RICHARD BURN, LL.D.

Published as the act directs Dec^r 1st 1796. by T. Cadell Strand.

10 K.C.

A
N E W
Law Dictionary:

INTENDED
FOR GENERAL USE,
AS WELL AS
FOR GENTLEMEN OF THE PROFESSION.

By RICHARD BURN, LL. D.
LATE CHANCELLOR OF THE DIOCESE OF CARLISLE.

And continued to the Present Time
By JOHN BURN, Esq. his Son,
ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE FOR THE
COUNTIES OF WESTMORLAND AND CUMBERLAND.

IN TWO VOLUMES.
VOL. I.

L O N D O N:
PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;
FOR T. CADELL, IN THE STRAND.

1792.

h



MVSEVM
BRITAN
NICVM

P R E F A C E.

THE work now presented to the public, is carefully printed from a fair manuscript, in *the author's own hand-writing*; to which there doth not appear to be any preface, or hint of the title that he might intend for it. It however so far coincides with his former publications, as to leave little doubt of his designation of it for the press; and he seems to have continued it, as matter occurred, till the time of his death.

It is now offered to the world, in the pleasing confidence, that it will answer the end for which, I have reason to think, it was originally intended; I, mean, for the use and information of those, who wish to have a rational knowledge of matters relating to their lives, properties, and other essential interests; to the critical knowledge of which, they are not professionally bred.

The author early discovered the want of such a Guide as might enable all ranks and professions of men, to act consistently, and prudently, in their respective paths of life. How far he hath contributed to this great end, in his JUSTICE OF THE PEACE, and ECCLESIASTICAL LAW, seems to be determined,
by

by the general approbation with which those publications have been received; and in what degree his present work may be thought *essential* to the same purpose, is submitted to the wisdom and candor of all competent judges.

My Father's very considerable attainments, not only in the *learned* and *gothic languages*, and in the *law of the land*; but also in matters of *antiquity*; seem to have induced him, to depend upon his own strength; and to produce an ORIGINAL WORK, not copying (as is too often done) from other books of the kind; in some of which the servility of transcribing, from one work to another, is but too obvious: And I am joined in opinion by a learned friend, well acquainted with my Father's literary pursuits, that the present book hath no particular reference, except it be to his own *previous publications*; and that his *real* motive was, to facilitate the understanding of *them*; and to effect such an acquaintance with the necessary terms, and technical language of the laws of his country, as might be profitable to those persons, for whose use and advantage he had compiled his former works.

It is unnecessary to assign the reasons, why this publication hath been so long postponed; but it may be proper to observe, that the delay hath caused a necessity of accommodating certain particulars to the present state of the law, wherein some material changes, and additions, are annually made; and
these

these additions, where necessary, I have carefully endeavoured to supply.

Finally, I beg leave to inform the reader, that the present publication is by the advice, and earnest solicitations, of my good friend Dr. CHARLES MORTON, of the British Museum, whose uniform friendship, and intimacy with my late Father, for a period of forty-eight years, have rendered him sufficiently acquainted with the end and purpose of most of his literary labours. To that gentleman, therefore, I dedicate this posthumous publication, as a memorial of the friendly intercourse and harmony, which subsisted, for near half a century, between him and my honoured Father.

JOHN BURN.

Orton in Westmorland,
Jan. 1, 1792.

A B A

ABATEMENT is derived from the French, and signifies quashing, beating down, or destroying; and is used by our law in three senses: The first is that of removing or *beating down* a *nusance*. In which respect, the person aggrieved by the nusance may abate or remove the same, without the formality of an action, so as he commit no riot in the doing of it. If a house or wall is erected so near to mine, that it stops my ancient lights (which is a *private* nusance), I may enter my neighbour's land, and peaceably pull it down. Or if a new gate be erected across the king's highway (which is a *public* nusance), any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this summary method of doing one's self justice is, because injuries of this kind require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. 3 *Black.* 5.

The second signification of abatement is, the defeating or overthrowing of an *action*, by some defect in the proceedings; as where exception is taken to the insufficiency of the matter; to the uncertainty of the allegation, by misnaming either of the parties, or the place; to the variance between the writ and the specialty or record; to the uncertainty of the writ or declaration; or to the death of either of the parties before judgment had. For these and many other causes, the defendant oftentimes prays, that the suit of the plaintiff may for that time cease. And in case of abatement in these respects, all writs and process must begin *de novo*. In the case of an *indictment*, on a criminal process, the defendant may plead in abatement, that his name is not as in the indictment specified, or that they have given him a wrong addition, as yeoman instead of gentleman; and if the jury find it so, the indictment shall abate. But in the end, there is little advantage accruing to the defendant by means of this kind of dilatory plea; because, if the exception be

Vol. I. B allowed.

allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be the true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. 4 *Black.* 335.

The third species of abatement is, where the rightful possession or freehold of the *heir* or *devisee* is defeated or overthrown by the intervention of a stranger. And herein it differs from *intrusion*, which is the entry of a stranger after a particular estate of freehold is determined, before him in *remainder* or *reversion*. An *abatement* is always to the prejudice of the *heir* or immediate *devisee*; an *intrusion* is always to the prejudice of the *remainder-man* or *reversioner*. For example: If a man dieth seised of lands in fee simple, and before the entry of his heir, a stranger enters thereon, this is an *abatement*; but if a man be tenant for life, with remainder to another in fee, and after the death of the tenant for life a stranger enters, this is an *intrusion*. The remedy in abatement or intrusion may be by entry, without the parties being put about to bring their action: for as the original entry of the wrong-doer was unlawful, this may therefore be remedied by the mere entry of him who hath right; unless a descent hath been cast, which gives the heir of the abator or intruder a colourable title, and therefore he shall not be ousted but by another making out a better claim. 3 *Black.* 175.

ABBEY, *abbatia*, is a society of religious persons, having an abbot or abbess to preside over them. Some of these were so considerable in this kingdom, that the abbots of them were called to parliament, and had seats and votes in the house of lords. Of abbots and priors who stately and constantly enjoyed this privilege, there were twenty-nine in all; viz. the abbot of Tewkesbury, the prior of Coventry, the abbots of Waltham, Cirencester, St. John's at Colchester, Croyland, Shrewsbury, Selby, Bardney, St. Bennet's of Hulme, Thorney, Hide, Winchelcomb, Battel, Reading, St. Mary's in York, Ramsey, Peterburg, St. Peter's in Gloucester, Glastonbury, St. Edmundsburg, St. Austin in Canterbury, St. Alban's, Westminster, Abingdon, Evesham, Malmesbury, and Tavistock, and the prior of St. John's of Jerusalem, who was stiled the first baron of England, but it was with respect to the lay barons only, for he was the last of the spiritual barons.

Abbey

Abbey lands, before the dissolution of the monasteries, were many of them discharged from the payment of tithes; either by the pope's bulls, or by real composition with the parson, patron, and ordinary; or by their order, as Cistercians, Templars, Hospitalars, and Præmonstratenses: But this was only so long as the lands remained in the hands of the several religious societies, and were cultivated by them, and not in the hands of their tenants or lessees. These exemptions by the dissolution had been abolished, if they had not been continued by the act of parliament 31 H. 8. c. 13. with respect to such of the monasteries as were dissolved by that act; which enacts, that they who shall have any lands belonging to the said religious houses, shall enjoy them discharged of the payment of tithes, in like manner as the abbots and others enjoyed the same at the time of their dissolution. Which act also created a new discharge, which was not before at the common law, that is, *unity of the possession* of the parsonage and land tithable in the same hand: for if the monastery, at the time of the dissolution, was seized of the lands and rectory, and had paid no tithes within the memory of man for the lands; those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession; because the same persons that had the lands, having also the parsonage, could not pay tithes to themselves. And now, though the titles of discharge under the 31 Hen. 8. are many of them lost, and cannot be made out at this day; yet if the lands of a religious house have been held since the dissolution freed from the payment of tithes, it shall be intended that they were held so before. *Wood, b. 2. c. 2.*

ABBREVIATION. By statute 4 G. 2. c. 26. all law proceedings shall be in the English tongue, and written in a common legible hand and character, and in words at length and not abbreviated: but by 6 G. 2. c. 14. this is somewhat mitigated, which allows, that they may be written in the like manner of expressing numbers by figures as hath been commonly used, and with such abbreviations as are now commonly used in the English language.

ABDICATION, *abdicatio*, in general, is where a magistrate or person in office renounces and gives it up. So on king James the Second's leaving the kingdom, the commons voted that he had *abdicated* the government, and thereby the

throne was become vacant. The lords would have had the word *deserted* to be made use of, but the commons thought it was not comprehensive enough, for then the king might have liberty of returning.

ABET, *abettare*, is to stir up or incite, encourage or set on; one who promotes or procures a crime. *Abettors* of murder, are such as command, procure, or counsel others to commit a murder; and in case they are present when the murder is committed, they shall be taken as principals, but if absent at the time of committing the fact, they shall be considered as accessaries only.

ABEYANCE, from the French *bayer*, to expect, is that which is in expectation, remembrance, and intendment of law. By a principle of law, in every land there is a fee simple in somebody, or else it is in *abeyance*; that is, though for the present it be in no man, yet it is in expectancy belonging to him that is next to enjoy the land. Thus if a man be patron of a church, and presenteth a clerk to the same; the fee of the lands and tenements pertaining to the rectory is in the parson: but if the parson die, and the church becometh void, then is the fee in *abeyance*, until there be a new parson presented, instituted, and inducted. 1 *Inst.* 342. And though where no person is seen or known in whom the *inheritance* can vest, it may be in *abeyance*, as in a limitation to several persons, and the survivor, and the heirs of such survivor, because it is uncertain who will be survivor: yet the *freehold* cannot, because there must be a tenant to the præcipe always. 1 *Vezey*, 174.

ABJURATION. Anciently, if a person had committed a felony, and did fly to a church or churchyard before he was apprehended, he could not be taken from thence to be tried for his crime; but on confession thereof before the coroner, he was admitted to his oath to abjure the realm. But by the 21 *J. c.* 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly abolished. 2 *Inst.* 628.

But there is one kind of abjuring the realm which yet remains, as not depending on any privilege of sanctuary; and that is, with respect to popish recusants convicted, removing from the place of their habitation without licence, and not conforming in three months after notice: in which case, they

they are required by statute 35 *Eliz. c. 2.* to abjure the realm before two justices of the peace or the coroner; the form of which abjuration, according to the old books, is this: *This hear you, Sir coroner, that I, A. B. am a popish recusant, and in contempt of the laws and statutes of England I have and do refuse to come to their church. I do therefore, according to the intent and meaning of the statute made in the 35th year of queen Elizabeth late queen of this realm of England, abjure the realm of England. And I shall haste me towards the port of C. which you have given and assigned to me, and that I shall not go out of the highway leading thither, nor return back again; and if I do, I will that I be taken as a felon of the king. And that at C. I will diligently seek for passage, and will tarry there but one flood and ebb, if I can have passage; and unless I can have it in such place, I will go every day into the sea up to my knees, assaying to pass over. So help me God and his doom.* Stamf. 116. Offic. Cor. 49.

There is also an oath of abjuration, whereby every person in any office, trust, or employment abjures the pretender, and recognizes the right of his majesty under the act of settlement, engaging to support him, and promising to disclose all treasons and traitorous conspiracies against him.

ABSQUE HOC, when the proceedings were in Latin, were words of exception made use of in a traverse; as where the defendant pleads that such a thing was done at such a place, *without this*, that it was done at such other place.

ABUTTALS are the buttings and boundings of lands, shewing by what marks they are distinguished: the *sides* of the lands are properly said to be *adjoining*, and the *ends abutting*, to the thing contiguous.

ACCEPTANCE is the taking and accepting of any thing, and is as it were a tacit agreement to a preceding act, which might have been defeated and avoided, were it not for such acceptance had. For example: If a bishop before the statute of 1 *Eliz.* leased part of his bishoprick for term of years, reserving rent, and then died; and afterwards another is made bishop, who accepts and receives the rent when due, by this acceptance the lease is made good, which otherwise the new bishop might have avoided. So if *husband and wife*, seised of lands in right of the wife, join and make a lease,

reserving rent, and the husband dies, after whose death the wife receives or accepts the rent; by this the lease is confirmed, and it shall bind her. So if *tenant in dower* leases for years, and dies, and the heir accepts the rent. But if a *parson* make a lease for years not warranted by the statute 32 H. 8. and which consequently is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 Saund. 241. And if a *tenant for life* make a lease for years, there no acceptance will make the lease good, because the lease is void by his death. Dyer, 46. 239. But if *tenant in tail* makes a lease for years, rendering rent, and dies, and the issue accepts the rent, it shall bind him. But if such tenant in tail makes a lease for years to commence after his death, rendering rent; in such case, acceptance of rent by the issue will not make the lease good to bar him, because the lease did not take effect in the life of his ancestor. Plowd. 418. If an *infant* accepts of rent at his full age, it makes the lease good and shall bind him. If a lease is made on condition that the lessee shall do no waste, and he commits waste, and afterwards the lessor accepts the rent, he cannot enter for the condition broken; because he thereby affirms the lease to have continuance. 1 Inst. 211. If the lessor accepts from his tenant the last rent due to him, and gives the lessee a release for it; all rent in arrear is by law presumed to be satisfied. 1 Inst. 373.

Acceptance of a *bill of exchange* by the person on whom it is drawn (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. But if he accepts it, either verbally or in writing, he thereby makes himself liable to pay it. If he refuses to accept it, and it is of the value of 20l. or upwards, and expressed to be for value received, the person to whom it is made payable, or to whom it is indorsed, may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by a notary public; or, if no notary public be resident in the place, then by any other substantial inhabitant in the presence of two witnesses: and notice of such protest must, within 14 days after, be given to the drawer. But if the bill be accepted, and afterwards the acceptor fails or refuses to pay it within three days after it becomes due (which three days are called the days of grace), the same must for non-payment be protested and notified, in like manner as for non-acceptance. And on producing the protest, either of non-acceptance or non-payment, the drawer

is bound to make good to the payee or indorsee, not only the amount of the bill (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law), but also interest and all charges, to be computed from the time of making the protest. 2 *Black.* 469.

ACCESSARY. I. *Accessary* (quasi *accedens* ad culpam) is he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.

In the highest capital offence, namely, high treason, there are no accessaries, neither before nor after; for the consenters, aiders, abettors, and knowing receivers and comforters of traitors are all principals. 1 *Hale's Hist.* 613.

Also in cases that are criminal, but not capital, as in petit larceny and trespass, there are no accessaries: for the accessaries before are in the same degree as principals; and accessaries after, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. *Id.*

Accessaries therefore relate only to capital felonies; in which cases there may be accessaries, either by the common law, or by act of parliament.

II. *Accessary before* the fact committed, is he that being *absent* at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. For if he is *present*, although another actually commits the felony, he is a principal offender; as if one present moves another to strike, or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes. *Hale's Pleas*, 216.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour (if need be) the escape of those who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law *present* at it. For it was made a common cause with them; each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give coun-

tenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprize. *Fest. Cr. Law*, 350.

III. Accessary *after* the fact is, where a person knowing the felony to be committed, relieves, comforts, or assists the felon. Generally, any assistance whatever given to a felon, to hinder his being apprehended or punished, makes the assister an accessary: as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man accessary to the felony. 4 *Black.* 37.

To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions: it was therefore at common law a mere misdemeanor, and made not the receiver accessary to the theft, because he received the *goods* only, and not the *felon*. But now by the statutes 5 *An. c.* 31. and 4 *Geo. c.* 11. all such receivers are made accessaries, and may be transported for fourteen years; and, in the case of receiving linen goods stolen from the bleaching grounds, are by the statute 18 *G. 2. c.* 27. declared felons without benefit of clergy. *Id.* 38.

IV. If the principal and accessary appear together, and the principal plead the general issue, the accessary shall be put to plead also; and if he likewise plead the general issue, both may be tried by one inquest: but the principal must be first convicted, and the jury shall be charged, that if they find the principal not guilty, they shall find the accessary not guilty. But if the principal plead a plea in bar, or abatement, or a former acquittal, the accessary shall not be forced to answer till that plea be determined; for if it be found for the principal, the accessary is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Harw.* 323. 1 *Hale's Hist.* 624.

In the case of stolen goods, if the principal cannot be taken, the buyer or receiver may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, although the principal be not convicted; which shall exempt the offender from being punished as accessary, if the principal be afterwards taken and convicted. 1 *An. st.* 2. *c.* 9. 5 *An. c.* 31.

ACCIDENTS are properly relievable in a court of equity. But there are many accidents which are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies. And there are many which cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. 3 *Black.* 431.

ACCORD is an agreement between the party injuring and the party injured, where one is injured by a trespass or offence done, or on a contract, to satisfy him with some recompence; which, if executed and performed, shall be a good bar in law, if the other party after the accord performed bring any action for the same. As if a man contract to build a house or to deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action: but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action. 3 *Black.* 15.

The accord must be executed before the action be commenced; and therefore an accord to do a thing at a day to come is not good. But if it be executed before the action commenced, it is good, although it was executory only at the time of the accord. 1 *Roll's Rep.* 129.

If a man plead an accord, the safest way is to plead it as a satisfaction, and not by way of accord; and therefore he need say no more than that the defendant gave so much to the plaintiff in satisfaction, which the plaintiff received. 9 *Co.* 80.

The defendant must plead that the plaintiff accepted the thing agreed upon in full satisfaction; and if it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond itself, for that cannot be discharged but by writing under hand and seal. *Cro. Ja.* 254.

ACCOUNT is a writ or action, commanding the defendant to render a just account to the plaintiff, or shew to the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments; the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and when such account is finished, then

then the second judgment is, that he pay to the plaintiff so much as he is found in arrear. This action, by the old common law, laid only against the parties themselves, and not their executors; because matters of account rested solely in their own knowledge. But this defect was remedied by statute 4 *An. c. 16.* which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account, is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Therefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance. 3 *Black. 162.*

A plea of a stated account is bad, unless it shews the account was in writing, and what the balance was. 2 *Atk. 399.*

A stated account is not an extinguishment of the original debt; therefore it cannot be pleaded in bar of an action for the debt. *Bur. Mansf. 9.*

AC ETIAM are words or a clause in a writ, where, in order to intitle the court to jurisdiction, an additional cause of action is alleged; as where, upon the usual complaint of *trespass*, the defendant is required to be brought in to answer the plaintiff of a plea of *trespass*, and also (*ac etiam*) to a bill of debt: or where, to the usual complaint of breaking the plaintiff's close, a clause is added containing the real cause of action.

ACOLITE, *acolythus*, in our old English called a *colet*, was an inferior church servant, who, next under the sub-deacon, followed or waited on the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance,

ACQUITTAL (Fr. *acquitter*, from the Latin *acquietare*) signifies a discharge or being at rest from the suspicion of a crime; as he that is upon a trial and judgment given thereon discharged of a felony, is said to be acquitted of the felony: and if he be drawn in question again for the same felony, he may plead *anterfois acquit*. For one shall not be brought into

into danger of his life upon the same accusation more than once. 1 *Inst.* 100. Acquittal is of two kinds; acquittal *in deed*, and acquittal *in law*. Acquittal *in deed* is, when a person is cleared by verdict. Acquittal *in law* is, as if two be indicted of felony, the one as principal, and the other as accessary, and the jury acquits the principal, in this case by law the accessary also is acquitted. 2 *Inst.* 384.

AN ACQUITTANCE is a sort of release, being a discharge in writing of a sum of money or other duty, which ought to be paid or performed. As if one is bound to pay money upon an obligation, or rent reserved upon a lease, and the party to whom it is due, upon receipt thereof, gives a writing under his hand, witnessing that he is paid. This is such a discharge in law, that he cannot demand and recover the sum or duty again, if the acquittance is produced. *T. L.*

The obligor is not bound to pay money upon a single bond, unless the obligee will make him an acquittance. Nor is he bound to pay it before he has the acquittance. And in this case the obligor may compel the obligee to make him an acquittance. But otherwise it is in case of an obligation with a condition; for there one may aver payment. *Wood, b. ii. c. 3.*

But an acquittance is only an evidence of payment, and by the common law was not pleadable, because it is no deed. But now, by the statute of 4 *An. c. 16.* where an action of debt shall be brought on a single bill or on a judgment, if the defendant hath paid the money due thereupon, such payment may be pleaded in bar of such action: and where an action of debt is brought upon a bond conditioned to be void on payment of a lesser sum, at a day and place certain; if the defendant hath paid, before the action brought, the principal and interest due by the condition of such bond, though not strictly according to the condition, yet it may be pleaded in bar of the action: and on payment into court of principal, interest, and costs, the same shall be a full discharge of the bond. *f. 12, 13.*

An acquittance in full of all *accounts*, shall be extended only to accounts. *Wood, b. ii. c. 3.*

An acquittance in full of all *demands*, will discharge all debts except such as are upon specialty under seal: for these can only be destroyed by some other specialty of equal force, as a general release. *Cro. Ja. 650.*

If a rent is behind for a number of years, and the landlord makes an acquittance of the last that is due, all the rest are presumed to be paid, and the law will admit no proof against this presumption. 1 *Inst.* 373.

ACRE (*ager*) is commonly understood to be a quantity of land, containing in length 40 perches, and in breadth 4 perches; or in proportion thereto, be the length or breadth more or less: but by custom it differs in different places. The word anciently meant any open ground or field, as *castle-acre*, *west-acre*, and the like, and not a determinate quantity of land: so there was *acre-fight*, a sort of duelling in the open field.

ACTIONS are of three kinds; *real*, *personal*, and *mixed*:

Action *real* is that which concerns real property only; whereby the plaintiff or demandant claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. 3 *Black.* 117.

Action *personal* is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass. *Id.*

Action *mixed* is an action that lieth as well for the thing demanded, as against the person that hath it; on which, the thing is recovered, and likewise damages for the wrong sustained. *Id.*

ACTON BURNEL, a statute so called, made 13 *Ed.* 1, ordaining the *statute merchant*: it was so termed from a place named *Acton Burnel*, where it was made; being a castle sometime belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropshire*.

ACT OF PARLIAMENT is a statute, act, or edict, made by the king with the advice and consent of the lords spiritual and temporal and commons in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 *Hen.* 3. though doubtless there were many acts before that time, the records of which are now lost, and which possibly at present pass for parts of the ancient common law. 1 *Black.* 85.

An act of parliament is the exercise of the highest earthly authority that this kingdom acknowledges. It hath power
to

to bind every subject in the land, and the dominions thereunto belonging; nay even the king himself, if particularly named therein; and it cannot be altered, amended, dispensed with, suspended, or repealed, but by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. 1 *Black.* 186.

The method of citing acts of parliament is various. Many of the ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of *Merton* and *Marleberge*, of *Westminster*, *Gloucester*, and *Winchester*. Others are denominated entirely from their subject; as the statutes of *Wales* and *Ireland*, the *Articuli cleri*, and the *Prerogativa regis*. Some are distinguished by their initial words, as the statute of *quia emptores terrarum*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of *Ed. 2.* is by naming the year of the king's reign in which the act was made, together with the chapter or particular act according to its numeral order. *Id.* 85.

Statutes are either *general*, or *special*; *public*, or *private*. A *general* or *public* act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. *Special* or *private* acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; and of these the judges are not bound to take notice, unless they be formally shewn and pleaded. *Ibid.*

There are three points to be considered in the construction of an act of parliament; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief. *Id.* 87.

Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. *Id.* 89.

If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose. *Id.* 90.

A statute made in the affirmative, without any negative expressed or implied, doth not take away the common law;

and therefore the party may waive his benefit by such statute, and take his remedy by the common law. 2 *Inst.* 200.

Regularly, a statute in the affirmative doth not repeal a precedent affirmative statute; but if the latter is contrary to the former it amounts to a repeal of the former. *L. Raym.* 160.

Penal statutes must be construed strictly: but statutes against frauds are to be construed liberally and beneficially. 1 *Black.* 88.

One part of a statute must be so construed by another, that the whole (if possible) may stand together: but a saving totally repugnant to the body of the statute is void. *Id.* 89.

Where things of an inferior degree are first mentioned in a statute, those of a higher dignity shall not be included under subsequent general words; as where a statute speaks of indictments to be taken before justices of the peace, or others having power to take indictments, it shall be understood only of other inferior courts, and not of the king's bench or other courts at *Westminster*. 2 *Co.* 46.

All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and says, the offender shall suffer death, clergy lies notwithstanding, and is never ousted without express words. 3 *Inst.* 73.

Saving of dower in a statute making an offence felony is superfluous; for by the 1 *Ed.* 6. c. 12. dower is not lost by the felony of the husband.

Where no particular penalty is appointed for disobedience to an act of parliament, it is punishable as a contempt, by fine and imprisonment at the discretion of the king's courts of justice. 4 *Black.* 122.

ACTOR, the proctor or advocate in the civil law courts. So there was *actor dominicus*, the lord's bailiff or attorney; *actor villa*, the steward or head bailiff of a town or village. *Cowel.*

ACTUARY, the register or clerk that enters the acts of a court.

ADDITION signifies a title given to a man, besides his christian and surname, setting forth his estate or degree, his trade, and the place where he inhabits; and this is, to prevent the inconvenience of mistaking one person for another. Additions of *estate or degree* are, yeoman, gentleman, esquire, knight,

knight, and the like. Additions of trade or occupation are those of merchant, clothier, carpenter, taylor, husbandman, labourer, and all other lawful occupations. Additions of place are, of such a town or hamlet, and of such a county. If there be a corporation of one sole person, he may be named by the common law by his christian name without any surname, as *Thomas* bishop of *Exeter*. 2 *Inst.* 666. So a duke, marquis, earl, viscount, or baron, might by the common law be named by his christian name, and by the name of his dignity, as *John* duke of *Marlborough*. *Id.* An addition after an *alias dictus* is ill; for if the party is not sufficiently named in the first part, the *alias dictus* will not help it. 3 *Salk.* 20. Where there are several persons of different names, and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187. If a man hath divers trades or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of a gentleman; because it is worthier than the addition of any trade or mystery: and in general, a man shall be named by his worthiest title of addition. 2 *Inst.* 668, 9. Where a son hath the same name and the same addition with his father, the addition of *the younger* is necessary to be made to the other additions of the son; but it is not necessary to add *the elder* to the additions of the father. 2 *Haw.* 187. The eldest sons of peers, in the life-time of their fathers, though frequently titular lords, yet are only esquires. And foreign noblemen in *England* have only the legal title of esquire. 2 *Haw.* 187. Clerk is a good addition of a clergyman; and if a man hath taken any degree in either of the universities, he may be named by that degree. 1 *Black.* 405. Widow, singlewoman, spinster, and (as some say) wife of such an one, are good additions; and the place of the habitation of a wife is sufficiently shewn, by shewing that of her husband. 2 *Haw.* 190. If a man lives in a hamlet of a town, he may be named either of the hamlet or of the town: But the addition of parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good. 2 *Inst.* 669.

ADEPTION, or taking away, of a legacy, arises from a supposed alteration of the testator's intention; as where a man bequeaths money due upon a certain bond, and afterwards

wards calls it in; or bequeaths to the legatee such a horse; and afterwards sells the horse.

ADJOURNMENT, is a putting off until another day, or to another place. The court of parliament is frequently adjourned from time to time, as also the courts of law from day to day, and from one term to another.

ADJUDICATION, a giving or pronouncing judgment.

ADMEASUREMENT, *admesuratio*, is a writ brought for remedy against such persons as usurp more than their share, to bring them to reason. It lies in two cases; one is, *admeasurement of dower*, where a man's widow after his decease holds from the heir more land as dower than of right belongs to her: in which case, the heir shall have this writ against the widow, whereby she shall be *admeasured*, and the heir restored to the overplus. The other is, *admeasurement of pasture*, where a man has common appendant or appurtenant to his land, or common in gross, the quantity of which common hath never yet been ascertained: in which case, as well the lord, as any of the commoners is intitled to the writ of *admeasurement*; which is one of those writs that are called *vicontiel*, being directed to the sheriff (*vicecomiti*), and not to be returned to any superior court, till finally executed by him. It recites a complaint, that the defendant hath furcharged the common; and therefore commands the sheriff to *admeasure* and apportion it, that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit the commoners shall be *admeasured*, as well those who have not as those who have furcharged the common, as well the plaintiff as the defendant. The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendance of the sheriff, what and how many cattle each commoner is intitled to put upon the common. And the rule for this *admeasurement* is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle only as are *levant* and *couchant* upon his tenement; which being a thing uncertain before *admeasurement*, has frequently, though erroneously, occasioned this unmeasured right of
of

of common to be called a common without stint or without number; a thing which, though possible in law, doth in fact very rarely exist. If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of second surcharge, *de secunda superoneratione*, which is given by the statute 13 Ed. 1. c. 8. and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and shall also pay damages to the plaintiff. 3 Black. 238.

ADMINISTRATION is the management of the goods and chattels of one that died intestate, committed unto him by the ordinary. He or she to whom the administration is committed, is called the administrator or administratrix. *Terms of the Law.*

Administration of the goods and chattels of the wife shall be granted to the husband or his representatives; and of the husband's effects, to the widow, or next of kin, or to both. Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases. This nearness of degree shall be reckoned according to the computation of the civilians, and not of the canonists, which the law of England adopts in the descent of real estates; because in the civil computation the intestate himself is the *terminus* from which the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore, in the first place, the children, or (on failure of children) the parents of the deceased, are intitled to the administration: both which are indeed in the first degree, but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews (and the females of each class respectively), and lastly, cousins. 2 Black. 504.

The *half blood* is admitted to the administration equally with the whole blood; but not so in the descent of lands, for in that case the half blood can never inherit.

If none of the kindred will administer, the ordinary may grant administration to a creditor, or he may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and therewith pay the

debts of the deceased; in which respect the ordinary becomes liable in law as other administrators.

If a *bastard*, or any other who has no kindred, dies intestate; the goods belong to the king, and administration shall be committed to the king's grantee.

There are also several other kinds of administration, which do not strictly follow the rule of the next of kin. As, administration *durante minori atate*; which is, where an infant is made executor (for so he may be how young soever): in which case, administration with the will annexed is granted to another, until the executor shall attain the age of seventeen years; at which age of the executor the administration *durante minori atate* ceaseth.

So also, administration *durante absentia*, during absence out of the kingdom: which is, where the next of kindred is beyond sea, in which case administration is grantable, lest the goods perish or the debts be lost: and this stands upon the same reason as an administration during the minority of an executor; namely, that there should be one to manage the estate of the testator, till the person appointed by him is able.

Administration *pendente lite*, pending a suit, is, where a suit is commenced in the ecclesiastical court concerning the validity of a will; in which case the ordinary grants administration until the suit shall be determined: otherwise there would be no person to take care of the estate of the deceased.

Also, if the testator makes his will, without naming any executor, or if he names a person incapable; or if the executor named refuses to act; in all these cases, the ordinary must grant administration with the will annexed.

The duty of an administrator is, to make an inventory, and to pay the debts of the deceased: and if there be a deficiency of assets, the general order of preference or priority in payment is, first, debts of record, as judgments, statutes, and recognizances; next, specialties, as bonds or other writings under seal; and lastly, debts on simple contract, as notes unsealed, and verbal promises.

If there is a surplus, the administrator must distribute it amongst the kindred of the deceased, according to the statutes of distribution, and in some particular places according to the local customs. The general rules upon the statutes of distribution are, that one third shall go to the widow of the intestate, and the residue in equal proportions to his children,

children, or, if dead, to their representatives, that is, their lineal descendants: if there are no children or legal representatives, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor child, the whole shall be distributed amongst the next of kindred in equal degree and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The father succeeds to the whole personal effects of his children, if they die intestate and without issue; but if the father be dead, and the mother survives, she shall only come in for a share equally with each of the remaining children.

If an administrator die, his executor or administrator doth not represent the first intestate, but a new administration shall be granted *de bonis non*, that is, of the goods of the deceased not administered by the former executor or administrator. And this administrator *de bonis non* is the only legal representative of the deceased in matters of personal property.

ADMIRALTY: The word *admiral*, according to lord Coke, comes from the Saxon *aen mere al* (over all the sea), the *praefectus maris*; and in ancient time the office of the admiralty was called *custodia marinae Angliae*, or *maritimae Angliae*. 1 *Inst.* 260.

The court of admiralty is held before the lord high admiral or his deputy, who is called the judge of the admiralty. It was first of all erected by king *Ed.* 3. Its proceedings are according to the method of the civil law, and is usually held at doctors' commons. 3 *Black.* 69.

This court hath power to try and determine all maritime causes, or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of the ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. *Id.* 106.

Beneath the low-water mark, the admiral hath sole and absolute jurisdiction: but between the high-water mark and the low-water mark, the common law and the admiral have jurisdiction by turns; one upon the water, the other upon the land. But if the water is within a county, the common law hath the jurisdiction. 5 *Co.* 107.

Wreck of the sea shall be tried and determined by the laws of the land ; but this cannot be extended to flotsam, jetsam, or lagan, for they are in or upon the sea, and therefore cannot be tried and determined by the common law, but are to be determined before the admiral. *Id.* 106.

For convenience of seamen, the admiralty hath been allowed to hold plea for mariners' wages ; but yet with this limitation, that if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such case they will be prohibited. This indulgence was permitted them, because the remedy in the admiralty is easier and better : easier, because they must sever at the common law, whereas here they may join ; and better, because the ship itself is answerable. 1 *Salk.* 33.

But although pure maritime acquisitions, which are earned and become due on the high seas, are one proper object of the admiralty jurisdiction, even though the contract be made upon land ; yet, in general, if there be a contract made in *England*, and to be executed upon the seas, as a charter party or covenant that a ship shall sail to *Jamaica*, or shall be in such a latitude by such a day ; or a contract made upon the sea to be performed in *England*, as a bond made on shipboard to pay money in *London*, or the like ; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law. And it is not unfrequent for the plaintiff to feign that a contract, really made at sea, was made at some inland place, and thereby draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall. 3 *Black.* 107.

From the sentence of an inferior court of admiralty, an appeal lies to the court of the lord high admiral. And from the sentence of the admiralty judge, an appeal lies to the delegates. But in case of prize vessels taken in time of war, in any part of the world, and condemned in any courts of admiralty as lawful prize, the appeal lies to certain commissioners of appeals, consisting chiefly of the privy council, and not to judges delegates : and this, by virtue of divers treaties with foreign nations ; by which, particular courts are established in all the maritime countries of *Europe*, for the decision of this question, whether lawful prize or not. For this being a question between subjects of different states, it belongs intirely to the law of nations, and not

to the municipal laws of either country to determine it.
3 *Black.* 69.

And sentence in a foreign court of admiralty is to be credited here, as ours is to be credited there; and the party may libel here for the execution of a sentence in a foreign court of admiralty.

The high court of admiralty is also a court not only of civil, but of criminal jurisdiction. It hath cognizance of all crimes and offences committed either upon the sea, or on the coasts out of the body or extent of any *English* county. And heretofore they were determinable by the sole sentence of the judge of the admiralty; but by the 28 *Hen.* 8. c. 15. all felonies committed on the sea shall be tried by commissioners nominated by the lord chancellor, viz. the judge of the admiralty and three or four more (among whom two common-law judges are constantly appointed, who in effect try all the prisoners), the indictment being first found by a grand jury of 12 men, and afterwards tried by another jury, as at common law. 4 *Black.* 268.

ADMISSION to a benefice is, when the bishop upon examination approves of the person presented, as a fit person to serve the cure of the church to which he is presented; as institution is that act whereby he commits to him the cure of souls.

ADMITTANCE is the giving possession of a copyhold estate, as livery of seisin is of a freehold. And it is of three kinds: 1. Upon a *voluntary grant by the lord*, where the land hath escheated or reverted to him. In this case, though he might keep the land in his own hand, or might grant the same in fee, and so enfranchise it, yet if he will dispose of it as copyhold, he is bound to grant the usual estate, and reserve the usual rent, and observe the ancient custom precisely in every point; otherwise it would be to create a new copyhold. 2. Upon *surrender by the former tenant*. In this case, the lord is not proprietor, but only a necessary instrument of conveyance; the party claiming his estate under him that made the surrender. But until his admittance, the tenant hath no estate, and therefore cannot surrender it again to a stranger before admittance. 3. Admittance by *descent*; which is, where an heir is tenant immediately on the death of his ancestor. The lord here is a mere instrument; for the heir may enter upon the land, take the profits,

sits, bring actions of trespass, and surrender to whose use he pleases, before admittance; though, before admittance, he cannot be sworn of the homage. This admittance of the heir is not to strengthen his estate, but to intitle the lord to his fine. And if the heir will not come in and take his admittance, he shall forfeit his estate, or be subject to a penalty, according as the custom of the manor may be. *Wood, b. ii. c. 1.*

AD QUOD DAMNUM is a writ, issuing out of and returnable into the chancery, directed to the sheriff, to enquire by a jury, of *what damage* it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like. And according to the sheriff's return thereof, the grant is issued or with-held.

ADVENTURE, a thing sent to sea; the *adventure* whereof the person sending it stands to out and home. *Lex Mercat.*

ADULTERY is a crime left by our laws to the coercion of the spiritual courts; yet considered as a civil injury, the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. 3 *Black.* 139.

ADVOCATE is the patron of a cause, assisting his client with advice, and who pleads for him. It is the same, by the civil and ecclesiastical laws, as a counsellor by the common law. The ecclesiastical or church advocate was originally of two sorts; either an advocate of the causes and interest of the church, retained as a counsellor and pleader of its rights; or an advocate or patron of the presentation or advowson. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them.

ADVOW, *advocare*, to justify or maintain an act formerly done. As if one takes a distress for rent, and he that is distrained sues a replevin; in this case, the distrainer justifying or maintaining the act, is said to *advow* or *avow*: and hence come *advowant*, and *advowry*. This word is also used to signify to bring forth any thing; anciently, when goods

goods stolen were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found; and he, in whose possession they were found, was bound *advocare*, that is, to call in or produce the seller to justify the sale, and so on till they found the thief.

ADVOWSON is the right of presentation to a church or ecclesiastical benefice. It signifies being *advocate* of the church, or taking it into protection; and therefore is synonymous with *patronage*: and he who has the right of advowson is called the patron of the church. For when lords of manors first built churches on their own demesnes, and endowed them with glebe or other possessions, every such lord had of common right a power annexed of nominating a minister to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the *patron*. 2 *Black.* 21.

Advowsons are either *appendant*, or *in gross*. Lords of manors being originally the only founders, and of course the only patrons of churches, the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson *appendant*; and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words. But where the property of the advowson hath been once separated from the property of the manor, by legal conveyance, it is called an advowson *in gross*, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands. *Id.* 22.

Advowsons are also either *presentative*, *collative*, or *donative*. An advowson *presentative* is, where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified. An advowson *collative* is, where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he doth, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution. An advowson *donative* is, when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the

ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. *Id.*

An advowson in fee is affets by descent, to satisfy bond creditors. 3 *Atk.* 465.

AERIE is a proper term for hawks, which for other birds is called a *nest*. The liberty of keeping aerys of hawks was a privilege granted to great men: and the preserving the aerys in the king's forests, was one sort of tenure of lands by service.

ETATE PROBANDA was a writ that lay to inquire, whether the king's tenant holding *in capite* by knight's service, was of full age to receive his lands into his own hands. It was directed to the escheator of the county, but is now disused, since wards and liveries were by statute taken away.

AFFERORS (from *affurer*, to tax) are those in the court leet or court baron that settle and moderate the fines and amercements imposed on such persons as have committed faults for which no express penalty is prescribed by statute. The persons nominated to this office affirm upon their oaths, what penalty they think in conscience ought to be inflicted upon the offenders.

AFFIANCE is the plighting of troth between a man and a woman upon their agreement of marriage. It is derived from the Latin word *affidare*, and signifies as much as *fidem dare*, to pledge one's faith or fidelity. *Litt. sect.* 39.

AFFIDAVIT signifies in law an oath in writing, sworn before some person who hath authority to take it. The plaintiff or defendant may make affidavit in a cause depending, but it will not be admitted in evidence at the trial, but is only admitted upon motion. Affidavits ought to set forth the matter of fact only, which the party intends to prove by his affidavit; and not to declare the merits of the cause, of which the court is to judge. An affidavit regularly ought to be before the judges of the court wherein the cause is depending: but by the statute 29 *C. 2. c. 5.* the judges of the courts of king's bench, common pleas, and exchequer, may grant commissions to persons in the country to take affidavits concerning any matter depending in the respective courts,

courts, in like manner as may be done by masters extraordinary of the court of chancery. When an affidavit hath been read in court, it ought to be filed, that the other party may see it and take a copy of it.

AFFIRM signifies to ratify or confirm a former law or judgment.

AFFINITY is relation by marriage, as consanguinity is relation by blood.

AFFIRMATION is an indulgence allowed by law to the people called *Quakers*, who, in cases where an oath is required from others, may make a solemn affirmation of the truth: and if they make a false affirmation, they are subject to the penalties of perjury. But their affirmation is not allowed in any criminal cause, nor shall they by virtue hereof be allowed to serve on any juries, or to bear any office or place of profit in the government. 7 & 8 W. c. 34. 8 G. c. 6. 22 G. 2. c. 46.

AFFRAY (from *affraier*, to terrify) is the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no affray, but an assault. 4 Black. 145.

Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other like officer, is bound to keep the peace; and for that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may carry them either before a justice, or imprison them by his own authority for a convenient time, till the heat be over. *Id.*

It is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. 1 Haw. 135.

Also it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge or to fight,
as

as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. *Id.*

All affrays in general are punishable by fine and imprisonment. 1 *Haw.* 138.

AGE is particularly used in law for those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example, a man at twelve years of age ought to take the oath of allegiance to the king; at fourteen, which is his age of discretion, he may consent to marriage, and chuse his guardian; and at twenty-one he may alienate his lands: a woman at nine years of age is dowable, at twelve she may consent to marriage, at fourteen she is of years of discretion, and may chuse a guardian, and at twenty-one she may alienate her lands. The age of twenty-one is the full age of man or woman; which enables them to contract and manage for themselves, in respect of their estates: until which time they cannot act with security to those that deal with them, for their acts are in most cases either void or voidable. 1 *Inst.* 78.

AGE PRAYER is, where an action is brought against a person under age, for lands which he hath by descent, and he by petition or motion shews the matter to the court, and prays that the action may stay till his full age. See *Parol demurrer*.

AGISTMENT is where other men's cattle are taken into any ground, at a certain rate for their feeding: it comes from the *French* word *geyser* (*jacere*) to lie down, because the beasts that feed there are levant and couchant, that is, lying and rising. In the king's forests, there were anciently officers called *agisters*, *agitatores*, or *gyst takers*; who took in cattle to graze in the forest, or to be fed upon the pawnage, and who tended and looked after the said cattle agisted, and collected and received the money paid for the agistment. 4 *Inst.* 293. The tithe of agistment of cattle is due of common right, because the grass which is eaten is *de jure* tithable, and must have paid tithe if cut when full grown. And it is to be paid by the occupier of the ground, and not by the owner of the cattle: for if the occupier in such case were not liable, it would be greatly inconvenient to sue every owner of the beasts, and it might be hard to be known,
and

and infinite. Where there is no special custom concerning the manner of paying this tithe, it is usual to pay the tenth part of the money received: but this is only for convenience, for the tenth part of the produce, and not a sum of money, is due *de jure*. 2 *Inst.* 651. 1 *Roll's Abr.* 656. *Wulf. c.* 50.

AGNATI are the kindred by the father's side, as *cognati* are kindred by the mother. 2 *Black.* 235.

AGNUS DEI is a piece of white wax in a flat oval form, like a small cake, stamped with the figure of the lamb, and consecrated by the pope. By statute 13 *El. c.* 2. to import any *Agnus Dei*, or other superstitious thing pretended to be hallowed by the bishop of *Rome*, incurs the penalty of a *præmunire*.

AGREEMENT is of three kinds: 1. An agreement *executed* already at the beginning; as where money is paid for the thing agreed on, or other satisfaction made. 2. An agreement after an act done by another; as where one doth such a thing, and another person agrees to it afterwards, which is executed also. 3. An agreement *executory*, or to be performed in future. This last sort of agreement may be divided into two parts; one certain at the beginning; the other, when, the certainty not appearing at the first, the parties agree that the thing shall be performed upon the certainty known. *Terms of the Law.*

An agreement put in writing only for remembrance, doth not change its nature; but if it be put in writing, sealed and delivered, it is of greater force. *Hob.* 79.

By the statute of frauds, 29 *C. 2. c.* 3. All agreements for lands shall be in writing signed by the parties, otherwise they shall only have effect as estates at will. And no action shall be brought, to charge any person upon any special promise to answer for the debt of another person, or upon any contract of marriage, or upon any agreement not to be performed within a year, unless the same be put in writing, and signed by the party charged therewith.

AIDS were originally mere benevolences, granted by the tenant to his lord, in times of difficulty and distress: but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three; 1. To ransom the lord's person, if taken prisoner.

2. To

2. To make the lord's eldest son a knight. 3. To marry the lord's eldest daughter, by giving her a suitable portion. The aids for making the eldest son a knight, and for marrying the eldest daughter, were fixed by act of parliament at 20s. being the supposed twentieth part of every knight's fee. The aid for ransoming the lord's person was in its nature uncertain and incapable of being ascertained. 2 *Black.* 64.

AID-PRAYER is a word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested. As tenant for life, being impleaded, may pray in aid him in the reversion; that is, desire the court that he may be called by writ, to alledge what he thinks proper for maintenance of the right of the person calling him, and of his own. *F. N. B.*

AILE (of the French *aiel*, avus, a grandfather) is a writ that lies, where a man's grandfather, or great grandfather (called *beaile*), being seized of lands and tenements in fee simple on the day that he died, a stranger abateth or entereth the same day, and dispossesses the heir of his inheritance. *F. N. B.*

ALBA FIRMA, a white rent, paid in silver, in distinction from rent paid in corn, cattle, or the like.

ALDERMAN, *calderman*, *elderman*, was anciently a person, who from his age and experience was appointed to preside in certain affairs requiring prudence and judgment; but now chiefly restricted to towns corporate, where they are associates to the mayor or other chief magistrate.

ALE-CONNER, *ale-taster*, is an officer appointed in the court leet sworn to look to the assize and goodness of ale and beer within the precincts of the leet. *Kitch.* 46.

ALEHOUSES :

1. Every inn is not an alehouse, nor is every alehouse an inn: but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn.

2. By several statutes, licences to keep inns and alehouses shall be granted yearly at a general meeting of the justices of the division, on the first day of *September*, or within twenty days

days after, and at no other time : except in cities and towns corporate. And the persons licensed shall enter into recognizance to keep good order and rule. And if any person shall sell ale without licence, he shall forfeit for the first offence 40s. for the second offence 4l. for the third and every other offence 6l. 5 G. 3. c. 46. And by 27 G. 3. c. 13. several excise duties are imposed on ale and beer brewed in *Great Britain*, according to a schedule set forth in the act.

3. If one who keeps a common inn refuses either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same ; he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 1 *Harv.* 225.

4. An innkeeper may detain the person of the guest who eats, or the horse which eats, till payment. For it would be hard to oblige him to sue for every little debt ; and a greater hardship, that he might not be able to find his guest. *Bac. Abr. Inns.*

But an horse committed to an innkeeper may be detained only for his own meat, and not for the meat of the guest, or of any other horse. Also if the innkeeper or ale-house keeper shall refuse to give in the reckoning in particulars, or shall sell in-measures unsealed, he shall not be permitted to detain for the reckoning, but shall be left to his action at law. 11 & 12 *W. c.* 15.

In like manner if the innkeeper gives credit to the party for that time, and lets him go without payment ; then he hath waved the benefit of the custom, and must rely on his other agreement. 8 *Mod.* 172.

An innkeeper that detains a horse for his meat cannot use him ; because he detains him as in custody of the law : and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer. But by custom in particular places, if the horse eat out his price, the innkeeper may take him as his own, on the reasonable appraisement of several of his neighbours : but the innkeeper has no power to sell the horse, by the general custom of the realm. *Bac. Abr. Inns.*

5. An innkeeper shall answer for those things which are stolen within his inn, though not specially delivered to him to keep ; for it shall be intended to be through his negli-

gence, or occasioned by the default of his servants. So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen, he must make satisfaction: but otherwise, if with his direction. 8 *Co. Caley's case*.

6. A guest in an inn, arising in the night, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, although there was no trespass in taking them (which is generally required in cases of felony). *Dalt. c. 40.*

ALE SILVER is a rent or tribute annually paid to the lord mayor of *London*, by those that sell ale within the liberty of the city.

ALESTAKE, a stake set up at fairs or merry meetings in the country, with a sign thereon, denoting that ale is sold there.

ALIAS is a second or further writ, after a former writ hath been sued out without effect: "We command you as we *formerly* have commanded you," *sicut alias precipimus*.

ALIAS DICTUS is used in the description of a defendant, where his true name is not certainly known.

ALIEN:

1. Alien is one that is born out of the dominions of the crown of *England*. 1 *Black.* 366.

2. But children of the king's ambassadors born abroad have always been held to be natural subjects. *Id.* 373.

3. An alien born may purchase lands or other estates, but not for his own use; for the king, upon such purchase, is intitled to them. *Id.* 371.

4. But an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation. *Id.* 372.

5. Also aliens may trade as freely as other people; only they are subject to certain higher duties at the custom-house; which is what is now called the alien's duty; to be exempted from which, is one principal cause of the frequent applications to parliament for acts of naturalization. *Id.* 316.

6. An alien may bring an action concerning personal property,

perty, and may make a will and dispose of his personal estate. *Id.* 372.

7. By several acts of parliament, all children born out of the king's allegiance, whose fathers (or grandfathers by the father's side) were natural born subjects, are now deemed to be natural born subjects themselves to all intents and purposes; unless such ancestors were attainted, or banished beyond sea for high treason: yet so as that the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be able to claim any interest, unless the claim be made within five years after the same shall accrue. *Id.* 373.

8. If an Englishman living beyond sea marries a wife there, and has a child by her, and dies; this child is born a denizen, and shall be heir to him, notwithstanding that the wife was an alien. *Cro. Cha.* 601.

9. Aliens can have no heirs, because they have not in them any inheritable blood. 2 *Black.* 249.

10. If an alien be made a denizen by the king's letters patent, and then purchases lands, his son, born before his denization, shall not inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization hath not. 2 *Black.* 249.

11. The necessity of trade has mollified the too rigorous rules of the old law, in the restraint and discouragement of aliens. A *Jew* may bring an action, though heretofore he could not; but commerce has taught the world more humanity. And therefore it is held, that an alien enemy commorant here, by licence of the king, and under his protection, may maintain an action of debt upon a bond, even though he did not come with safe conduct. *L. Raym.* 282. 1 *Atk.* 43.

On a bill in chancery, brought for an account against the representatives of an *East India* governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here, lord *Hardwicke* said, as the

the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court, and overruled the defendant's plea, without hearing counsel of either side. 1 *Atk.* 51.

An alien enemy, who was the captain of a *French* privateer, took an *English* ship, upon the high seas, in time of open war; and ransomed the ship and cargo; and had the mate given to him as an hostage; which hostage died in prison. The ransom bill was signed by both captains, and by the hostage; and by it the captain obliges himself and his owners to pay to the *French* captain the ransom money within two months. By the court: An action is maintainable by the *French* captain against the *English* captain upon this ransom bill; notwithstanding the death of the hostage, and notwithstanding the plaintiff's being an alien enemy. And the like law prevails both in *France* and *Holland*. *Burr. Mansf.* 1741.

12. An alien whose sovereign is in amity with the crown of *England*, residing here, and receiving the protection of the law, owes a local allegiance to the crown during the time of his residence; and if, during that time, he commits an offence, he shall be liable to be punished for the same, even as a natural born subject. For his person and personal estate are as much under the protection of the law, as the natural born subject's; and if he is injured in either, he has the same remedy at law for such injury. *Fost.* 185.

So also, an alien whose sovereign is at enmity with us, living here under the king's protection, committing offences, may be proceeded against in like manner; for he oweth a temporary local allegiance. *Id.*

ALIENATION is a transferring the property of any thing from one man to another. It chiefly relates to lands and tenements; as, to aliene land in fee, is to sell the fee simple thereof; to aliene in mortmain, is to make over lands or tenements to a charitable use.

All persons who have a right to lands may, generally, aliene them to others. But some alienations are prohibited; as alienation by tenant for life, tenant for years, tenant in dower: if these aliene for a greater estate than they have in the lands, it is a forfeiture of their estate. 1 *Inst.* 251.

Conditions in deeds that the purchaser shall not aliene, are void. But one may grant an estate in fee, on condition that the grantee shall not aliene to a particular person.

Also

Also estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to aliene to others, for preservation of the reversion. *Lit.* 361.

By the 12 C. 2. c. 24. All fines for alienation are taken away, except fines due by particular customs of particular manors.

ALIMONY is that maintenance, which, after a divorce of husband and wife, *a mensa et thoro*, the ecclesiastical judge allows to the woman out of her husband's estate. But in case of elopement, and living with an adulterer, the law allows her no alimony; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living. 3 *Black.* 94.

ALLAY is a word used for the tempering and mixture of other metals with silver or gold. In the mint, a pound weight of gold is coined into 44 guineas and an half, which is equal to 46l. 14s. 6d.: An ounce therefore of such gold coin is worth 3l. 17s. 10'd. in silver. A pound weight of standard silver bullion is coined into 62s. Therefore an ounce of silver bullion is worth 5s. 2d. *Smith's Wealth of Nations*, vol. 1. p. 49, 50.

ALLEGIANCE is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. And it is of two kinds; the one *natural*, the other *local*; the former being also perpetual, the latter temporary. *Natural* allegiance is such as is due from all men born within the king's dominions immediately upon their birth. *Local* allegiance is that which is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases, when such stranger transfers himself from this kingdom to another. 1 *Black.* 366. 370.—By the common law, every layman, above the age of twelve years, was obliged to take the oath of allegiance at the tourn or leet; and it was a high contempt to refuse it. 1 *Inst.* 68.

ALLODIAL, from *all*, and *odls* property, signifies intire or absolute property; in contradistinction to *feudal*, *fee-odls*, *all*, which denotes stipendiary property, for which the tenant performed certain stipulated services. 2 *Black.* 45.

ALLUVION is the *washing* of the sea or of a river; in which case the law is, that if land be gained of the sea by the washing up of sand and earth, by small and imperceptible degrees, so as in time to make it *terra firma*, it shall go to the owner of the land adjoining; but if the alluvion be sudden and considerable, it belongs to the king by his prerogative: so that the quantity of the ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon one of them, and leaves the other dry; the owner who loseth his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loseth his ground, he shall have what the river has left in another place, as a recompence for this sudden loss. 2 *Black.* 262.

ALMANACK is part of the law of *England*, of which the courts must take notice in the returns of writs, &c. but the *almanack* to go by, is that annexed to the book of common prayer. *Mod. Caf.* 41. 81.

And by several statutes a stamp duty is imposed on almanacks. See *Burn's Just.* tit. ALMANACK.

ALNETUM, a place where *alders* grow.

ALTARAGE comprehends not only the offerings made upon the altar, but also all the profit which accrues to the priest by reason of the altar, *obventio altaris*. Out of these, the religious assigned a portion to the vicar; and sometimes the whole altarage was given to him by the endowment. In some places, the word *altarage* hath been adjudged to extend to small tithes of divers kinds; but this can only be, where there is a special custom to support it. *Bunb.* 79.

ALTO ET BASSO signifies the intire submission (for high and low) of all differences to arbitration.

AMBASSADOR. By the 7 *An. c.* 12. all writs and processses, whereby the person of any ambassador or other public minister of any foreign prince or state, or of any of his domestics or domestic servants, may be arrested, or his goods distrained, shall be void. Provided, that no merchant

chant or other trader, within the description of any of the statutes against bankrupts, shall have any benefit of this act; nor any servant of an ambassador, unless the name of such servant be registered in the office of one of the secretaries of state, and by him transmitted to the sheriffs of *London* and *Middlesex*.

Generally, the rights, powers, duties, and privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions: for, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the controul of the private law of that state wherein they are appointed to reside. 1 *Black.* 253.

If an ambassador grossly offends, or makes an ill use of his character, he may be sent home, and accused before his master; who is bound either to do justice upon him, or avow himself the accomplice of his crimes: but the general practice throughout *Europe* seems now to be, not to punish him in the country where he executes the function of ambassador. *Id.*

AMENABLE (from the French *main*, a hand) signifies tractable, *ad manum*, that may be led or governed. In the modern sense, it signifies to be responsible, or subject to answer in a court of justice.

AMENDMENT (*amendatio*) is the correction of an error committed in any process which may be amended after judgment; but if there be any error in giving the judgment, the party is driven to his writ of error: though where the fault appears to be in the clerk who writ the record it may be amended. *Terms of the Law.* Formerly suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in paper, for they were then considered only *in fieri*, and therefore subject to the controul of the courts. But when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration: but now the courts are become more liberal, and, where justice requires it, will allow of

amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they, at present, consider the proceedings as *in fieri* till judgment is given; and therefore, that till then, they have power to permit amendments by the common law, but when judgment is once given and inrolled, no amendment is permitted in any subsequent term. Mistakes are also frequently helped by the statutes of amendment and jeofails, so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeofails*, I have failed), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exceptions. 3 *Black.* 406.

AMERCEMENT is, to be at the king's mercy with regard to the *quantum* of a fine imposed. By *magna charta*, c. 14. no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear, saving to the land-owner his land, to the trader his merchandize, and to the husbandman his team and instruments of husbandry: in order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms, shall be set or reduced to a certainty by the oath of a jury. In the court-leet and court baron, this is usually done by *assessors*, or jurors sworn to *assess*; that is, to tax and moderate the general amercement according to the particular circumstances of the offence and the offender. In limitation of which, in courts superior to these, the ancient practice was, to inquire by a jury, when a fine was imposed upon any man, how much he was able to pay by the year, saving the maintenance of himself, his wife, and children. And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life, and by the bill of rights it is particularly declared, that excessive fines ought not to be imposed. 4 *Black.* 372.

AMICUS CURIE. If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court as *amicus curie*. 2 *Co. Inst.* 178.

AMNESTY,

AMNESTY, *amnestia oblivio*, an act of pardon or oblivion, such as was granted by king *Charles II.* at the Restoration. *Corwell.*

AMY (*amicus*), a friend. So *prochein amy* is the next friend to be trusted for an infant. And infants may sue either by *prochein amy*, or guardian; but must answer by guardian. 3 *Salk.* 196.

ANCESTOR, *anteceffor*, is one from whom an inheritance is derived. It differs from the word *predeceffor*; for *ancestor* is applied to a natural person, *predeceffor* to a body politic or corporate. 1 *Inst.* 78. No person can be properly such an ancestor as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freehold; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, the presentation to a church, and such like. 2 *Black.* 209.

ANCESTREL is what relates to one's ancestors; as homage ancestrel, a writ ancestrel, and the like.

ANCIENT DEMESNE are those lands which were either reserved to the crown at the original distribution of landed property, or such as came to it afterwards, by forfeiture or other means. They were anciently very large and extensive, comprizing divers honors, manors, and lordships, but they are now contracted within a narrow compass, having been almost intirely granted away to divers subjects. 1 *Black.* 286.

The king's tenants of those lands were bound to divers services, as to plough the king's lands for so many days, to supply his court with such a quantity of provisions, and the like; in consideration whereof, they had many immunities and privileges granted to them, as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a *writ of right close*; not to pay tolls or taxes, not to contribute to the expences of knights of the shire, not to be put on juries, and the like. 2 *Black.* 99.

ANGEL, in money, signifies ten shillings in English coin.

ANGILD, Sax. *ane*, *one*, and *gild*, a tribute or fine ; was a single compensation for an offence. So *anblote* and *anscot*, was a single payment of scot and lot.

ANNO DOMINI, the computation of time from the incarnation of our Saviour. The *Romans* began their *era* of time from the building of *Rome* ; the *Grecians* computed by *Olympiads* ; and the *Christians* reckon from the birth of *Jesus Christ*. *Jac. Dict.*

AN ANNUITY is a yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only. 1 *Inst.* 144.

An *annuity* is a thing very distinct from a *rent charge*, with which it is frequently confounded : a *rent charge* being a burthen imposed upon and issuing out of *lands* ; whereas an *annuity* is a yearly sum chargeable only upon the *person* of the grantor. Therefore if a man by deed grant to another the sum of 20*l.* a-year, without expressing out of what lands it shall issue ; no land at all shall be charged with it, but it is a mere personal annuity. 2 *Black.* 40.

APPARENT HEIR. See HEIR.

APPARITOR, a messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear ; to arrest them ; and to execute the sentence or decree of the judges, &c. *Jac. Dict.*

APPEAL hath two significations in law ; one is, the removing a cause from an inferior court, or judge, to a superior ; as from one or more justices of the peace, to the quarter sessions. The other kind of appeal, is a prosecution against a supposed offender, by the party's own private action ; prosecuting also for the crown, in respect of the offence against the public. 2 *Haw.* 155.

In which latter sense, an appeal may be brought in three cases : 1. By a man for a wrong done to his ancestor. 2. By a wife for the death of her husband. 3. For wrong done to the appellants themselves ; as in case of robbery, rape, or maihem. *Wood, b. 4. c. 5.*

By

By statute 6 *Ed. 1. c. 9.* all appeals of death must be sued within a year and a day after the completion of the felony. And if a man be acquitted on an indictment of murder, or found guilty and pardoned by the king, yet he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, within which time an appeal may be brought. 3 *H. 7. c. 1.*

If the appellee is convicted, the ancient usage was, so late as Henry the Fourth's time, that all the relations of the slain should drag the appellee to the place of execution. 4 *Black. 316.*

Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in such case he can only pardon for himself, but not for the party. 2 *Haw. 155.* However the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal. 4 *Black. 316.*

If the person appealed be acquitted on the appeal, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king, 13 *Ed. 1. §. 1. c. 12.* that is, if the appeal shall appear to the court to have been malicious. 2 *Haw. 198.* And being acquitted on the appeal, he cannot afterwards be indicted for the same offence. 4 *Black. 315.*

But appeal is now intirely disused, on account of the great nicety required in conducting it, and the charges of prosecution; and indictment is the only method now taken. 4 *Black. 313.*

APPEARANCE in the law signifies the defendant's filing *common* or *special* bail, when he is arrested on any process out of the courts at *Westminster*. Anciently, the sheriff, on execution of the writ, was obliged to take the defendant into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became, in fact, the first process, it was thought hard to imprison a man for a contempt which was

only supposed; and therefore in common cases by the gradual indulgence of the courts (at length authorised by the statutes 12 G. c. 29. and 5 G. 2. c. 27), the sheriff or his officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being two imaginary persons, as *John Doe* and *Richard Roe*; or, if the defendant doth not appear upon the return of the writ, or within four (or in some cases eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.—But if the plaintiff will make affidavit that the cause of action amounts to 10*l.* or upwards, then the defendant upon the arrest must either go to prison, or put in *special bail*; which is done by entering into a bond to the sheriff, with one or more sureties, (not fictitious persons, as in the former case of common bail, but real, substantial, responsible men), to insure the defendant's appearance at the return of the writ, which is called the *bail bond*; and on return of the writ, or within four days after, the defendant must appear according to the exigency of the writ. Which appearance is effected by putting in bail *to the action*, and is commonly called putting in bail *above*. This bail above, or bail to the action, must be put in either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose by virtue of the statute 4 W. c. 4. 3 *Black.* 287. 289. Appearance saves error in mesne process. 1 *Vez.* 386.

APPENDANT (*appendens*) is a thing of inheritance belonging to another that is more worthy. As an advowson may be appendant to a manor, land appendant to an office, a seat in a church appendant to an house. 1 *Inst.* 121. So there is common appendant; which differs from common appurtenant. Common appendant is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Common appurtenant arises from no connection of tenure, but may be annexed

to lands in other lordships, or extended to other beasts besides such as are generally commonable, as to hogs, goats, and the like. 2 *Black*, 33. If a thing appendant to another be granted by itself, without the thing to which it is appendant, the appendancy is destroyed, and that which was appendant is become in gross: as if an advowson appendant be granted without the manor to which it is appendant; or the manor be granted, saving the advowson.

APPENDITIA, the *appendages* or pertinencies of an estate. Hence the word *penthouse*, for the appendage of an house.

APPORTIONMENT signifies a division or partition of a rent, a common, or the like; that is, a making of it into parts or *portions*.

If a man hath a *rent charge* to him and his heirs issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent charge is extinct, because the rent is intire, and issuing out of every part of the land, and therefore by purchase of part, it is extinct in the whole, and cannot be apportioned. *Lit.* 222.

But if a man, which hath a *rent service*, purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but only the parcel. For a rent service in such case may be apportioned according to the value of the land. *Id.*

But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast a horse, a spear, a rose, and such like; if in this case the lord purchase parcel of the land, such service is taken away, because such service cannot be severed nor apportioned. *Id.*

If the tenant holdeth by fealty, and a bushel of wheat, or a pound of cummin, or of pepper, or such like, and the lord purchases part of the land, there shall be an apportionment, as well as if the rent were in money: and yet, if the rent were by one grain of wheat, or one seed of cummin, or one pepper corn; by the purchase of part, the whole shall be extinct. 1 *Inst.* 149.

But if an intire service be for the *public good*, as castle-gard, cornage, and the like, or if it be for defence of the realm, or to repair a bridge or a way, or to keep a beacon, or for advancement of justice and peace, as to attend the
sheriff

sheriff in the execution of process; though the lord purchase part, the service remains. *Id.*

If a man hath common of pasture without number in twenty acres of land, and ten of those acres descend to another person, the common without number is intire and uncertain, and cannot be apportioned, but shall remain. But if it had been a common certain (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, turbary, fishery, and the like. *Id.*

But apportionment of rent or common is usually settled by covenant or special agreement.

APPORTUM (from the French *apport*) signifies properly the revenue or profit which a thing brings in to the owner. It was commonly used for a corody or pension. It was also applied to the payment made by the alien priories here in England to the superior house abroad; or sometimes it was what remained over and above the sustenance of such alien priory.

APPOSAL of sheriffs, is the charging them with money received upon their accounts in the exchequer.

APPRAISEMENT. See INVENTORY.

APPRENTICES (from *apprendre*, to learn) are usually bound for a term of years, by deed indented, to serve their masters, and be maintained and instructed by them. 1 *Black.* 426.

And hereby an infant is bound, though under age. Nevertheless they cannot bind themselves so as to intitle the master to an action of covenant, or other action for departing the service, or other breaches of the indenture; therefore it is usual for the father or some friend of the apprentice to be bound with him for the faithful discharge of his office, according to the terms agreed on. 8 *Mod.* 190.

The churchwardens and overseers of the poor may bind any such poor children apprentices, whose parents they shall judge not able to maintain them; till such man-child shall attain the age of 21, and such woman-child the age of 21 or marriage. 43 *El. c. 2.* 18 *G. 3. c. 47.*

Also they may, by the consent of two justices, bind out any boy of the age of 10 years who shall be chargeable, or whose parents shall be chargeable, or who shall beg for
alms,

alms, to be apprentice to the sea service, till he shall attain the age of 21 years. 2 & 3 *An. c. 6.*

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation; though if the master or master's wife beats any other servant of full age, it may be good cause of being discharged, on complaint to the justices. 1 *Black. 428.*

For, generally, disputes between masters and apprentices are in most cases determinable before the justices of the peace.

Inticing an apprentice to depart from his master, is not an offence for which an indictment will lie; but the party's remedy is by an action on the case, which he may well maintain. *Bur. Mansf. 1306.*

An apprentice gains a settlement, where he serves the last forty days of his apprenticeship.

An apprenticeship being a personal trust, becomes determined by the death of the master; unless there are special words in the indenture to the contrary. *Bur. Set. Caf. 320.*

Persons having served seven years as apprentices to any trade, have an exclusive right to set up that trade in any part of *England*, except where they are prohibited by the bye-laws or local privileges of divers corporations. And if a man shall in any town exercise a trade, without having served an apprenticeship for seven years, he shall forfeit 40*s.* a month.

APPROPRIARE COMMUNIAM is to approve or to appropriate and inclose part of a common to a man's own separate use; and this may be done either by the lord of the manor, or by a tenant with the lord's permission; provided they leave sufficient common for the rest of the tenants.

APPROPRIATION is the annexing of a benefice to the proper and perpetual use of some religious house, bishoprick, college, or *spiritual* person, to enjoy for ever. To make an appropriation, the king's licence was to be obtained in chancery, and also the consent of the ordinary, patron, and incumbent. And in this manner the religious houses of old time became possessed of that vast number of advowsons, which they had in this kingdom; when these churches, after the dissolution of the monasteries, came into lay hands,
the

the church so possessed by a *layman* was called an *impropriation*, and himself the *impropriator*. But the words *appropriation* and *impropriation* are often confounded and used for each other.

APPROVEMENT, by the statute of *Merton*, 20 *H.* 3. c. 4. is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common with egress and regress for the commoners. If there be not sufficient common left for the tenant, he may have a writ of *assise*, and by 3 & 4 *Ed.* 6. c. 3. shall recover treble damages, and a commoner may break down an inclosure, if the lord doth inclose part of the common, and not leave sufficient room in the residue; but if any, upon just title of approvement, do make a hedge or ditch for that purpose, which afterwards is thrown down in the night by persons unknown, the towns adjoining may be distrained to make such hedge at their own charges, for which there is a writ (*noctanter*) in the register. 13 *Ed.* 1. c. 46.

But in the case of *Duberley v. Page*. *E.* 28 *G.* 3. it was determined, that the lord has no right under the statute of *Merton* to inclose and approve the wastes of a manor, where the tenants of the manor have a right to dig gravel on the wastes; or to take estovers there. *Ces.* by *Durnford & East*. 2 *V.* 391.

APPROVER, *prover*, (*probator*), is a person indicted of treason or felony, and in prison for the same, who, upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment, and this accusation of himself, and oath, makes the accusation of another person of the same crime, to amount to an indictment; and if his partners are convicted he shall have his pardon of course. But as it is in the discretion of the court, whether they will suffer one to be an approver, this method is now out of use; but in many cases we have what amounts to the same thing by statute, where pardon is assured to offenders on discovering and convicting their accomplices. 3 *Inst.* 129.

APPURTE-

APPURTENANCES (*pertinentia*, *appertaining* or belonging to) signify things both corporeal and incorporeal appertaining to some other thing as principal: as an hamlet to a chief manor, common of pasture to lands, common of estovers to an house, out-houses, yards, orchards, gardens are appurtenant to a messuage; but lands cannot properly be said to be appurtenant to a messuage. 1 *Lil. Abr.* 91. Turbary may be appurtenant to an house, but not to lands; a leet may be appurtenant to a manor, but not to an house, for the things must agree in nature and quality. 1 *Inst.* 121.

ARBITRATION:

1. Arbitration is, where the parties submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of one, two, or more arbitrators, who are to decide the controversy; or if the two do not agree, it is usual to add, that another person be called in as umpire, to whose sole judgment it is then referred. 3 *Black.* 16.

2. Generally all matters of controversy, either of fact, or of a right in things and actions personal and uncertain, may be submitted to arbitration. 9 *Co.* 78.

But matters of freehold, or any right and title to a freehold, cannot be submitted to arbitration; yet if the parties enter into mutual bonds to stand to the award relating to lands and tenements, they forfeit their bonds unless they obey it. 1 *Roll's Abr.* 242. 244.

Also criminal matters, as felonies and other indictable offences, cannot be submitted to arbitration; and although the submission be by bond, yet the obligation is void, and the parties may be punished for entering into such bonds. 1 *Bac. Abr.* Arbitrament.

3. Of submission there are divers kinds:—a submission by words is good, and the party in whose favour the award is made hath a remedy to enforce the performance of it. Yet it is not expedient that any submission should be by words only, because the party may revoke it any time before the award made, and that by word likewise, besides that it lays a great foundation for perjury. . *Compl. Arbitr.* 21.

Submission may also be by covenant; but this method is seldom used; for though it contains the same certainty with a bond, yet the method of suing on a covenant is different, and more difficult than suing upon a bond. *Id.* 7. 45.

There

There may also be a submission *by rule of court*, which is in pursuance of the statute 9 & 10 *W. c.* 15. whereby the parties may agree that their submission be made a rule of such of his majesty's courts of record as the parties shall chuse; which court will thereupon carry the award into execution in the same manner as for contempt of a rule of court.

Or the submission may be by *bond*, which in some respects is preferable to a submission by rule of court; for an award made in pursuance of bonds of submission may bind the parties executors; but if he who refuses to perform an award made pursuant to a rule of court shall die, the statute directing that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost also. *Compl. Arbitr.* 34.

Or the submission may be both by *bond* and *rule of court*, by adding the parties consent at the bottom of the condition of the bond, and this seemeth to be the best way, for then the party may proceed which way he pleases; and it is said, he may proceed both ways, that is, both on the bond, and also have an attachment for the contempt. 1 *Salk.* 73.

It hath been usual also, of late years, to insert in the submission a caution that *no bill in equity* shall be filed against the arbitrators; for it would be a very great hardship upon arbitrators if they should be harassed with suits, and the allowing them to be liable to such suits would effectually discourage persons of worth from accepting the office of arbitrators. 2 *Atk.* 395.

4. The award must be made according to the submission: upon which ground it hath been disputed, whether awarding releases to the time of the award, and not to the time of the submission, is good; but it seems to be now settled, that such award is not totally void, but good for so much as is within the submission, and void for the residue. *Bac. Abr. Arbitrament.*

An award that one shall pay for the writings of the award, or the reckoning in the house where the award was made, is void; for such things are plainly out of the submission. 1 *Roll's Abr.* 254.

If the submission be, so as the award be ready to be delivered to the parties, or to such of them as shall desire the same, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be, so that the award be delivered to each party

by such a day, then must it be delivered to each party accordingly. *Wood, b. 4. c. 3.*

The award must be beneficial to either party, for an award of one side only is not good; so if an award be that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Id.*

Also an award must be possible and lawful; thus, if an award be that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law.

So also the award must be certain and final, upon which account the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed is expired. *Cro. Ja. 585.*

Generally, the award shall be expounded according to the intent of the arbitrators, and shall not be unravelled in a court of equity, unless there was corruption in the arbitrators; for the arbitrators being persons of the parties own choosing, the law presumes that they would choose persons whose understanding and judgment they could rely on. *Bur. Mansf. 701.*

5. Arbitrators cannot proceed on a reference, after they have once named an umpire; for then their authority ceaseth, though the time for making the award is not yet expired. *Id.*

Form of a Submission by Rule of Court.

WHEREAS divers disputes and controversies have arisen, and are now depending, between A. B. of ——— in the county of ——— yeoman, of the one part, and C. D. of ——— in the said county, yeoman, of the other part, touching and concerning ——— now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them for, touching, and concerning, the premises, shall be referred and submitted to the arbitrament, final end, and determination of A. A. of ——— in the said county, gentleman, B. A. of ——— in the said county, yeoman, and C. A. of ——— in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before

before the — day of — next ensuing the date hereof: and it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at Westminster. In witness whereof the said parties to these presents have hereunto set their hands, this — day of — in the year of our Lord —.

Bond of Arbitration.

KNOW all men by these presents, that I A. B. of — in the county of — gentleman, am held and firmly bound to C. D. of — in the said county, yeoman, in — pounds of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain attorney, his executors, administrators, or assigns, to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the — day of — in the — year of the reign of our sovereign lord George the Third, of Great Britain, France and Ireland, king, defender of the faith, and so forth, and in the year of our Lord —.

The condition of this obligation is such, that if the above-bound A. B., his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe, and keep the award, order, arbitrament, final end and determination of A. A. of — esquire, and B. A. of — gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above-bound A. B. as of the above-named C. D. to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, covenants, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages, and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing and ready to be delivered to the said parties, on or before the — day of — now next ensuing; [and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity against the said A. A. and B. A. or either of them, for or concerning their award in the premises;] then this obligation to be void, otherwise of force.

If

If the Parties have a mind to make their submission a Rule of Court, then this may be added :

And the above-bound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made and provided.

Condition to stand to the Award of Arbitrators, with an Umpire.

THE condition of this obligation is such, that if the above-bound A. B. his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of ———, or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said A. B. as by and on the part and behalf of the above-named C. D. to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties ; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the ——— day of ———, now next ensuing ; then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said A. B. his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premises ; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the ——— day of ———, now next ensuing ; and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred,

preferred, any bill in equity, against them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire in the premises: Then this obligation to be void, otherwise of force.

[And the above-bound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made and provided.]

Form of an Award.

TO all to whom these presents shall come, We A. B. of —, and C. D. of —, do send greeting:

Whereas there are several accounts depending, and divers controversies have arisen, between —, of —, yeoman, of the one part, and —, of —, yeoman, of the other part; and whereas, for the putting an end to the said differences, they the said —, and —, by their several bonds or obligations bearing date — last past, are reciprocally become bound each to the other, in the penal sum of —, to stand to, abide, perform, and keep the award, order, and final determination of us the said —, so as the said award be made in writing, and ready to be delivered to the parties in difference, on or before — next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premises, to the day of the date hereof, shall cease and be no farther prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning, the premises. And we do also award and order, that the said — shall deliver, or cause to be delivered, to the said —, at —, within the space of —, &c. And further, we do hereby award and order, that the said — shall, on or before —, pay or cause to be paid unto the said —, the sum of —. We do also award and order, &c. And lastly, We do award and order, that the said — and —, on payment of the said sum of —, shall, in due form of law, execute each to the other of them, or to the other's use, general releases,

leases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the — day of — last past (viz. the day of the date of the arbitration bonds). In witness whereof we have hereunto set our hands and seals the — day of —.

Witnesses hereof,

A. B.

C. D.

Form of an Umpirage.

[Recite the Arbitration Bonds as before.]

NOW know ye, that I —, umpire, indifferently chosen by —, having deliberately heard and understood the griefs, allegations, and proofs, of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth; That is to say, &c.

ARCHBISHOP :

1. An Archbishop is the chief bishop of the province, who next and immediately under the king hath supreme power, authority, and jurisdiction in all causes and things ecclesiastical; and has the inspection of all the bishops of that province. He hath also his own diocese, where he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal. As archbishop, upon receipt of the king's writ, he calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province. During the vacancy of any see in his province, he is guardian of the spiritualties thereof; as the king is of the temporalties; and he executes all ecclesiastical jurisdiction therein. If the archiepiscopal see be vacant, the dean and chapter are the spiritual guardians. The archbishop is intitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And he has a customary prerogative, when a bishop is consecrated by him, to have the

next presentation to such dignity or benefice in the bishop's disposal, as the archbishop shall chuse; which is therefore called his *option*. 1 *Black.* 380.

2. If we consider *Canterbury* as the seat of the metropolitan, it hath under it twenty-one bishops; but if we consider it as the seat of a diocesan, it comprehends only some part of *Kent* (the residue being in the diocese of *Rocheſter*), together with some other parishes dispersedly situate in several dioceses; it being an ancient privilege of this see, that the places where the archbishop hath any manors or advowsons, are thereby exempted from the ordinary, and are become peculiars of the diocese of *Canterbury*, properly belonging to the jurisdiction of the archbishop of *Canterbury*. *Godolph. Repert.* 14.

The archbishop of *Canterbury* has the privilege, by custom, to crown the kings and queens of this kingdom. And by the statute of 25 *H. 8. c. 21.* he has power of granting dispensations, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time, to hold two livings, and the like. 1 *Black.* 381.

The archbishop of *Canterbury* is styled primate and metropolitan of *all England*, albeit there is another archiepiscopal province within this realm; partly because of his ancient legatine power, and partly by his being enabled by the afore-said statute to grant faculties and dispensations in both the provinces alike.

At general councils abroad, the archbishop of *Canterbury* had the precedence of all other archbishops. *Godolph.* 21.

At home, he is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm, and all the great officers of state. *Id.* 13.

3. The archbishop of *York* hath under him only four bishops, namely, those of *Chester*, *Durham*, *Carlisle*, and *Man*: All the rest are under the archbishop of *Canterbury*. But the archbishop of *York* anciently claimed and had a metropolitan jurisdiction over all the bishops of *Scotland*, whence they had their consecration, and to which they swore canonical obedience, until about the year 1466, when the bishops of *Scotland* withdrew themselves from their obedience to this see; and, in 1470, pope Sixtus the fourth created the bishop of *St. Andrews* archbishop and metropolitan of all *Scotland*. *Id.* 14. 18.

The

The archbishop of *York* has the privilege to crown the queen consort, and to be her perpetual chaplain; and hath precedency of all dukes not being of the blood royal; and also before all the great officers of state, except the lord chancellor. *Id.* 13, 14.

4. The archbishops are said to be *enthroned*, when they are vested in the archbishoprick; whereas bishops are said to be *installed*. *Id.* 22.

They may retain and qualify eight chaplains, whereas a bishop can only qualify six. *Id.* 21.

In speaking and writing to an archbishop is given the title of *grace* and *most reverend father in God*; whereas bishops have the title of *lord*, and *right reverend father in God*.

And an archbishop writes himself *by divine providence*; whereas bishops only use *by divine permission*.

ARCHDEACON, the chief of the deacons, is one that hath ecclesiastical dignity and jurisdiction over the clergy and laity, next after the bishop, throughout the diocese, or in some part of it only. Generally, the archdeacon hath power, under the bishop, of the examination of clerks to be ordained; and also of induction of clerks instituted to a benefice; likewise of excommunication, injunction of penance, suspension, correction, inspecting and reforming abuses in ecclesiastical affairs: but his power is different in different dioceses, and therefore he is to be regulated according to the usage and custom of his own church and diocese.

ARCHES court, *curia de arcubus*, is so called, because it was anciently held in the church of *St. Mary-le-Bow*, which church had that appellation from the steeple thereof being raised at the top with stone pillars in the manner of an arch or bow. And the judge thereof, for the like reason, is called the *dean of the arches*; whose jurisdiction is properly over the thirteen parishes only belonging to the archbishop of *Canterbury* in *London*: but the office of *dean of the arches* having been for a long time united with that of the archbishop's *principal official*, he now, in right of this last-mentioned office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. The same person is likewise *judge of the peculiars*, that is, of all those parishes, fifty-seven in number, which, though lying in other dioceses, yet are no way subject to the bishop or archdeacon, but to the archbishop. From this judge there

lies an appeal to the king in chancery, that is, to a court of delegates appointed under the king's great seal. The courts of arches and of the peculiars, as also the admiralty court, the prerogative court, and the court of delegates (for the most part), are now held in the hall belonging to the college of civilians in *London*, commonly called *Doctors Commons*.

ARGENTUM ALBUM, silver coin, or pieces of bullion that anciently passed for money. So there was *white-maile*, or rent paid in silver; in contradistinction from *black-maile*, paid in cattle or other provisions.

ARGENTUM DEI, God's silver; money given in earnest upon the making of any bargain. In several manors, the acknowledgment paid to the lord on the admitting of a tenant, is called the God's penny.

ARIER BAN, the *ban* or proclamation of the king, for the *arraying* of his tenants, or their entering into the army.

ARMIGER, *esquire*, *escuyer*, *scutarius*, is a name of dignity, next above the degree of gentleman, and below a knight. Anciently he was one that was attendant on such as had the order of knighthood, *bearing* their *shields* and other *armour*, and helping them to horse, and performing other such like services.

ARMS are ensigns of honour, in latin *insignia*, which were originally intended to distinguish the different commanders in war. For being covered with their defensive armour, they could not be known; and therefore a certain badge was painted on their shields, which was called *arms*, but not made hereditary in families till the time of king *Richard* the first, on his expedition into the holy land. And besides shields with arms, they had also *coats* on which their arms were painted, from whence came the denomination of *coats of arms*.

Arma dare (to present one with armour) was anciently a ceremony in conferring the honour of knighthood: whereby such person *adoptabatur in militem*, which the French called *adouer*, and we to *dub* such a person a knight.

Arma libera were arms given to a villain when he was manumitted or made free: which arms were usually a sword and lance.

Arma

Arma reverſata, arms reverſed, was when a man, bearing coat armour, was convicted of treaſon or felony; his arms were thereupon reverſed, and he was degraded from all rank and precedence in title and dignity.

ARPEN, or *arpent*; a meaſure of land, differing in quantity in different places: It ſeems to have been generally leſs than an acre; as in ſome ancient inſtruments the computation is made by ſo many acres and ſo many *arpents*.

ARRAIGNMENT is the calling an offender to the bar of the court, to answer the matter charged upon him. In Latin it is *ad rationem ponere*, and in French *ad reſon*, or abbreviated *a reſn*; for as the ancient word *diſfrain* or *derayn* imports in Latin *diſfrationare*, to diſprove or evince the contrary of any thing that is or may be affirmed, ſo *arraigne* is *ad rationem ponere*, to call to account or answer. 2 H. H. 216.

The priſoner, on his arraignment, though under an indictment of the higheſt crime, muſt be brought to the bar without irons, and all manner of ſhackles or bonds, unleſs there be a danger of eſcape, and then he may be brought with irons. *Id.* 219.

Alſo there is no neceſſity that a priſoner, at the time of his arraignment, hold up his hand at the bar, or be commanded ſo to do; for this is only a ceremony for making known the perſon of the offender to the court; and if he answers that he is the ſame perſon, it is all one. 2 Haw. 308.

ARRAY, *arraia*, an old French word ſignifying to rank or ſet in order. In ancient times it was uſual for the king, upon any great emergency, to iſſue commiſſions of array, directed to ſeveral of the principal perſons in the reſpective diſtricts, to muſter and array, or ſet in military order, all the men capable to bear arms. *Array* is alſo applied to a jury, as ſet in order by the ſheriff in his return of the panel. And when a man intends to challenge the whole jury, as on ſuſpicion of partiality, or ſome default in the ſheriff who made the return, it is called *challenge to the array*.

ARREST:

1. *In civil caſes*. Arrest is the reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him

to become obedient to the will of the law: And it may be called the beginning of imprisonment. *Lamb. 93.*

An arrest must be by corporal seizing or touching the defendant's body. 3 *Black. 288.*

An officer cannot justify the breaking open an outward door or window, in order to execute process. If he doth, he is a trespasser. But if he finds the outward door open, and enters that way, or if the doors be opened to him from within, and he entereth, he may break open inward doors if he finds that necessary, in order to execute his process. *Fest. 319.*

For a man's house is his castle for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit takes refuge in the house of another, this rule doth not extend to *him*, it is not *his* castle, he cannot claim the benefit of sanctuary therein. *Id. 320.*

Peers of the realm, members of parliament, and corporations, are privileged from arrest: against them the process to compel appearance must be by summons and distress infinite. 3 *Black. 288.*

Attorneys and others attending the courts of justice are not liable to be arrested by the ordinary process of the court, but must be sued by bill (usually called a bill of privilege) as being personally present in court. *Id. 289.*

Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests; as also suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary going and returning. *Id.*

On a Sunday no arrest can be made, nor process served; except for treason, felony, or breach of the peace. 29 *C. 2. c. 7.*

2. *In criminal cases.* An arrest in criminal cases may be, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept. As where any persons are present, when a felony is committed, or a dangerous wound given, they are bound without any warrant to apprehend the offender, on pain of fine and imprisonment for their neglect. 2 *Haw. 74.*

So where an affray is made to the breach of the king's peace, any person may, without any warrant from a magistrate,

trate, restrain the offenders, to the end the king's peace may be kept: but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

If a warrant to arrest a person be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable, he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. 2 *Hawk.* 86.

And in such cases a man's house is no protection. For if a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him. In these cases, the justice which is due to the public must supersede every pretence of private inconvenience. *Foster*, 320.

ARREST OF JUDGMENT is, to stay or stop judgment on sufficient cause shewn. For, in many cases, though there be a verdict, yet no judgment can be had; as for some material defect in pleading, misbehaviour of the jury, want of notice of trial, or other like cause. A motion in arrest of judgment must be supported by proper affidavits.

ARSON, from *ardeo*, to burn. See **BURNING**.

ART AND PART is, where one charged with a crime, in committing the same, was both a *contriver* of, and acted his part in it.

ARTICLE, in one sense, signifies a complaint exhibited in the ecclesiastical court, by way of libel.—*Articles of the peace* are a complaint exhibited in the courts at *Westminster*, in order to compel the defendant to find sureties of the peace; in which case it is usual for the court, on issuing an attachment, to make an indorsement thereon, directing some justice of the peace in the country to take the security of the peace there, specifying the particular sums in which the party and his sureties shall be bound. *Bur. Mansf.* 1040. *Articles of war* are a code of laws made by his majesty from time to time for the regulation of the land forces, in pursuance of the several annual acts against mutiny and desertion.

tion.—*Articles of the navy* are rules and orders made by statute 31 G. 2. c. 10. for the government of the royal fleet.—*Articles of religion*, commonly called the 39 articles, are a body of articles drawn up by the convocation in 1562, unto which persons admitted into ecclesiastical offices are to subscribe.—*Articuli cleri*, are statutes containing certain articles relating to the church and clergy, made in the 14 Ed. 3.

ARTIFICERS AND LABOURERS :

1. There are several statutes for rating of wages in almost every kind of work, and penalties enjoined against taking or giving more than the wages so rated. But this hath been seldom put in practice. And indeed there are great objections. For besides that this rating puts good and bad workmen upon a level, and thereby destroys emulation; the easiness or difficulty of the same kind of work in different circumstances renders a certain limited sum very inadequate.

2. Disputes about wages, and almost all other kinds of differences between masters and workmen in the several kinds of labour and manufacture, are determinable in a summary way by justices of the peace.

3. All artificers and labourers, hired at a certain price, shall, between the middle of *March* and the middle of *September*, continue at work from five in the morning till seven at night; except half an hour for breakfast, an hour for dinner, and half an hour for drinking, and between the middle of *May* and the middle of *August*, half an hour for sleep: Between the middle of *September* and the middle of *March*, they shall continue at work from the spring of day until night; except half an hour for breakfast and an hour for dinner: On pain of having deducted out of his wages one penny for every hour's absence. 5 *El.* c. 4.

4. In the time of hay or corn harvest, the justices of the peace, and also the constables, may cause all artificers and persons meet to labour, to serve by the day in mowing, reaping, and getting of hay and corn; on pain of imprisonment in the stocks two days and one night. 5 *El.* c. 4.

5. If any artificer or labourer shall leave his work unfinished, except for want of payment of his wages; he shall suffer imprisonment for a month. *Id.*

6. If any artificer, workman, or labourer, shall join in any conspiracy to raise the price of labour, he shall forfeit 5*l.* and if not paid in six days, he shall be imprisoned for 20 days, and have only bread and water for his sustenance; for a second

cond offence 20l. or shall be set in the pillory; for the third offence 40l. or be set in the pillory, and lose one of his ears. 2 & 3 Ed. 6. c. 14.

7. If any person shall contract with or endeavour to persuade any artificer to go into any foreign country, not belonging to the crown of Great Britain, he shall forfeit 500l. and be imprisoned 12 months: for a second offence, he shall forfeit 1000l. and be imprisoned two years. 23 G. 2. c. 13.

And if any artificer shall go, or being there shall not return after notice, he shall be incapable of any legacy, or of being executor or administrator, and of taking any lands by descent, devise, or purchase, and shall forfeit his lands and goods, and be deemed an alien, and out of the king's protection. 3 G. c. 27.

And by the 23 G. 2. c. 13. 14 G. 3. c. 71. and 25 G. 3. c. 76. there are large penalties for carrying out of the kingdom tools or utensils in various sorts of manufacture.

ASSART, is land in the forest reduced to tillage. *Spelman* derives it from *exertum*, pulled up by the roots, for sometimes it is written *effart*. Others derive it from *exaratum*, ploughed up. *Manwood* says, it is an offence committed in the forest, by plucking up the wood by the roots that are thickets and coverts for the deer, and making the ground plain as arable land. This is esteemed the greatest trespass that can be committed in the forest to vert and venison, as it contains in it waste and more; for whereas waste of the forest is but felling down the coverts which may grow up again, *assart* is a pulling them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. But this is no offence if done by licence; for a man may have a licence to assart ground in the forest, and make it several for tillage. Assart rents are rents paid in some places for forest lands assarted. *Manw.* 171.

ASSAULT is an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner, at another; or strikes at him, but misses him; this is an assault, *insultus*: for which, though no actual battery is committed, yet the wrong doer may be indicted at the suit of the king, and fined for the offence; and also the party injured may have an action of trespass *vi et armis*, wherein he shall recover damages as a compensation for the injury. 3 *Black.* 120.

But

But on an action of assault and battery, where the jury shall give less than 40s. damages, the plaintiff shall have no more costs than damages, unless the judge shall certify on the back of the record, that an actual battery (and not an assault only) was proved upon the trial. 22 & 23 C. 2. c. 9.

ASSAY (Fr. *essay*), a proof or trial, is the examination of weights or measures, by the clerks of markets and others. So the *assayer* is an officer appointed for the trial of and marking of plate, or of the gold or silver coin in the mint.

ASSEMBLY (unlawful) is, when three persons or more assemble themselves together, with intent mutually to assist each other, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace, or to the terror of the people, whether the act intended was of itself lawful or unlawful. If after their meeting, they shall move forward towards the execution of any such act, whether they put it in execution or not, it is then a *riot*. And if they execute such a thing in deed, then it is a *riot*. 1 Harw. 155.

ASSETS (from the French *assez*, enough) is of two kinds; the one assets *by descent*, the other assets *in hand*. Assets *by descent* is, where a man is bound in an obligation, and dies seised of lands in fee simple, which descend to his heir, then this land shall be called *assets*, that is, *enough*, or sufficient to pay the same debt; whether he remains in possession of the land, or hath aliened it before action brought; therefore if a man covenants for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he hath an estate sufficient for this purpose, or *assets*, by descent from the covenantor; for though the covenant descends to the heir whether he inherits any estate or no, it lies dormant, and is not compulsory, until he hath assets by descent. 2 Black. 243.

Assets *in hand* is, when a man in like manner indebted makes executors, and leaves them sufficient to pay; or some commodity or profit is come unto them in right of their testator; this is called assets in their hands. T. L.

There is also another division of assets, into *legal* and *equitable* assets: *legal* assets are such as are liable to debts and legacies by the course of law; *equitable* assets are such as are only liable by the help of a court of equity.

So

So also, there are *real* and *personal* assets: *real* assets are such as concern the land; *personal* are such as concern the personal estate only.

An advowson, a mortgage, a lease for years, are assets. So is a reversion expectant upon an estate for life, when it happens. Bonds and other specialties are assets, when the money is received. A debt due from the executor to the testator is assets in equity to pay legacies.

It is a rule in equity, that personal assets must be first applied to satisfy the specialty debt; and, if deficient, the heir shall be charged for the real assets descended to him; and if these are deficient, then the devisee of an estate devised to him by the deceased is liable. 2 *Atk.* 434.

ASSIGNMENT is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this—that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignment he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor. 2 *Black.* 326.

There may be an assignment of an annuity, a mortgage, a rent charge, a judgment, a statute: but an authority or trust cannot be assigned over, unless it hath been specially granted to a man and his assigns. Also a cause of action, a right of entry, a title for condition broken, cannot be assigned over. *Wood, b. 2. c. 3.*

A thing in action, as a bond, or a just debt, are commonly said to be assignable over: but then one must sue for the same in the name of the assignor; so that, in reality, it amounts to little more than a letter of attorney to sue in his name. *Id.*

By several acts of parliament, the estates of bankrupts may be assigned over by the commissioners, and the assignees may bring actions in their own names: the judge's certificate for prosecuting felons to conviction may be assigned over once: also bills of exchange, and promissory notes, may be assigned; and the assignee may bring an action in his own name to recover the money.

Form of an Assignment of a Bond.

To all to whom these presents shall come, greeting: Whereas
 A. B. of ———, in and by one bond or obligation, bearing date
the

the ——— day of ——— in the year ——— became bound to C. D. of ——— in the penal sum of ——— conditioned for the payment of ——— and interest at a day long since past, as by the said bond and condition thereof may appear: and whereas there now remains due to the said C. D. for principal and interest on the said bond the sum of ———, now know ye, that he the said C. D. for and in consideration of the said sum of ——— of lawful British money to him in hand paid by E. F. of ———, the receipt whereof the said C. D. doth hereby acknowledge; hath assigned and set over, and by these presents doth assign and set over, unto the said E. F. the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in, and to the same. And the said C. D., for the consideration aforesaid, hath made, constituted, and appointed, and by these presents doth make, constitute, and appoint, the said E. F., his executors and administrators, his true and lawful attorney and attornies irrevocable, for him and in his name, and in the name and names of his executors and administrators, but for the sole and proper use and benefit of the said E. F., his executors, administrators, and assigns, to ask, require, demand, and receive of the said A. B., his heirs, executors, and administrators, the money due on the said bond; and, on non-payment thereof by the said A. B., his heirs, executors, or administrators, to sue for and recover the same; and on payment thereof, to deliver up and cancel the said bond and give sufficient releases and discharges for the same; and one or more attorney or attornies under him to constitute; and whatsoever the said E. F. or his attorney or attornies shall lawfully do in the premises, the said C. D. doth hereby allow and affirm. And the said C. D. doth covenant with the said E. F. that he the said C. D. hath not received, nor will receive, the said money due on the said bond, or any part thereof; neither shall or will release or discharge the same, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the said E. F. saving the said C. D. harmless, of and from any costs that may happen to him thereby. In witness, &c.

ASSISE, *assesso*, anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assise* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments. Yet, still the judges in their circuits have a commission of *assise*, directed to themselves and the clerk of assise,

fiſe, to take the aſſiſes, that is, to take the verdict of a peculiar ſpecies of jury called an aſſiſe, and ſummoned for the trial of landed diſputes. Unto which commiſſion of aſſiſe, four others are now ſuperadded: 1. A commiſſion of *general gaol delivery*, directed to the judges and clerk of aſſiſe aſſociate; which gives them power to try every priſoner in the gaol, and none but priſoners in the gaol. 2. A commiſſion of *oyer and terminer*, directed to the judges and many of the gentlemen of the county; by which they are impowered to *hear and determine* treaſons, felonies, or other miſdemeanors, by whomſoever committed, whether the perſons to be tried be in gaol or not in gaol. 3. A commiſſion or writ of *nifi prius* directed to the judges and clerk of aſſiſe, whereby civil cauſes brought to iſſue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cauſe of action ariſes; and on return of the verdict of the jury to the court above, the judges there give judgment. 4. A commiſſion of the *peace* in every county of their circuit.

At the ſaid aſſiſes the ſheriff is required to attend, and to give notice to all juſtices of the peace, mayors, coroners, eſcheators, high conſtables and bailiffs of liberties, that they alſo attend, with their rolls, records, indictments, and other remembrances: and if they make default in appearance, the judges may fine them for their neglect.

Of the ancient writs of aſſiſe there are four kinds: 1. Aſſiſe of *novel diſſeiſin*, which is, where tenant in fee ſimple, fee tail, or for term of life, is put out and diſſeiſed of his lands or tenements, rents, common of paſture, common way, or of an office, toll, or the like. 2. Aſſiſe of *mort de anceſtor*, which lies, where a man's anceſtor, under whom he claims, dies ſeiſed of lands, tenements, rents, or the like, that were held in fee; and after ſuch anceſtor's death, a ſtranger abateth. 3. Aſſiſe of *darrein preſentment*, which is, where a man and his anceſtors have preſented a clerk to a church, and afterwards, the church being void, a ſtranger preſents his clerk to the ſame church, whereby the perſon having right is diſturbed. 4. Aſſiſe *de utrum*, which lies for a parſon againſt a layman, or a layman againſt a parſon, for lands or tenements, doubtful whether they may be lay fee, or free alms, belonging to the church. *T. L.*

There is alſo *aſſiſe of the foreſt*, touching orders to be obſerved therein. The aſſiſe of *bread and beer*, for regulating

lating the weight and quality thereof; and many other such like.

Affisors are those who set the affise, and sometimes the jury of affise are so denominated. *Affisus*, rented or farmed out for such an affised or certain rent; and hence comes the word to *affess*, or rate, the proportion in taxes and payments by assessors.

Affisa cadere is to fail in one's suit, or to be nonsuited; as when there is such a plain and legal insufficiency in a suit that the complainant can proceed no farther in it.

ASSOCIATION, *associatio*, is a writ or patent sent by the king, either at his own motion, or at the suit of a party-plaintiff, to the justices appointed to take assizes, or of *oyer* and *terminer*, to have others *associated* unto them. And this is usual where a justice of assise dies; and a writ is issued to the justices alive to admit the persons associated: also where a justice is disabled, this is practised. *F. N. B.* 185. *Reg. Orig.* 201. 206. 223.

1. AN ASSUMPSIT is a voluntary promise made by word, or supposed to be made by word, whereby a person, upon valuable consideration, *assumeth* or undertaketh to perform or pay something to another. *T. L.*

An *assumpsit* is either *express* or *implied*:

2. *Express*, is by direct agreement either by word, or (which is all one in law) by note in writing without seal; as where a person assumes or promises to make a good title of land sold; or to pay money upon a bargain and sale; or to deliver goods according to agreement: so if a builder assumes or promises that he will build an house within a limited time, and fails to do it; the person damnified hath an action of *assumpsit* against the builder for this breach of his promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay. 3 *Black.* 157.

And herein it differs from an action of debt; for in an action of debt the plaintiff must recover the whole debt he claims, or nothing at all: for the debt is one single cause of action, fixed and determined. But in an action of *assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied promise, and consequently the damages for the breach of it, are in their nature indeterminate; and

and the jury will, according to the nature of the proof, allow either the whole damages laid in the declaration, or any inferior sum. 3 Black. 154.

So in the case of a debt by simple contract, if the debtor promises to pay it and doth not, this breach of promise intitles the creditor to his action of *assumpsit*, instead of being driven to an action of debt. *Id.* 157.

Thus likewise a promissory note, or note of hand not under seal, to pay money at a certain day, is an express *assumpsit*; and the person to whom it is payable may recover the value of the note in damages, if it remains unpaid. *Id.*

3. *Implied*: As if I employ a person to transact any business for me, or perform any work, the law implies, that I undertook or *assumed* to pay him so much as he reasonably deserved. And if I neglect to make him amends, he hath a remedy for this injury, by bringing his action upon this implied *assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*. 3 Black. 161.

There is also an implied *assumpsit* on a *quantum valebat*; being where one takes up goods or wares of a tradesman, without expressly agreeing for the price. In this case the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action of *assumpsit* may be brought accordingly, if the vendee refuses to pay that value. *Id.*

So also, where one has had and received money of another, without any valuable consideration given on the receiver's part; as where money has been paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation: for the law construes this to be had and received for the use of the owner only, and implies that the person so receiving, promised and undertook to account for it to the true proprietor. *Id.* 162.

So an *assumpsit* will lie for money received by a bailiff or steward; for money due on an account stated upon an *informal computassit*; or upon a bill of exchange; for if a merchant to whom it is directed subscribes the bill, it is an *assumpsit*

sumpsit in law: in all these cases it is implied by the law, that the one agreed to pay to the other, though he made no express promise to do it. *Wood, b. 4. c. 4.*

4. But by the statute of frauds and perjuries, 29 C. 2. c. 3. no action shall be brought to charge the defendant upon any contract or sale of lands, or any interest concerning the same; or upon any agreement that is not to be performed within a year after the making thereof; unless the agreement or some memorandum or note thereof shall be in writing signed by the party to be charged therewith, or by some other person authorised by him: and no contract for the sale of any goods of ten pounds value shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or except some memorandum or note in writing be made, signed by the parties or their agents.

ATTACHMENT, from the French *attacher*, to tie or make fast, signifies the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of *Westminster-hall*, and above all the court of king's bench, may proceed in a summary manner according to their discretion. 2 *Haw. 141.*

Contempts that are thus punished are either *direct*, which openly insult or resist the powers of the court or the persons of the judges; or *consequential*, which tend to a disregard of their authority. The principal instances of either sort that have been usually punished by attachment, are chiefly of the following kinds: 1. Those committed by *inferior judges and magistrates*; by acting unjustly or oppressively in their offices, or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, certiorari, error, superledeas, or the like. 2. Those committed by *sheriffs, bailiffs, gaolers*, and other officers of the court; by abusing the process of the law, or by acts of oppression, extortion, or neglect of duty. 3. Those committed by *attornies and solicitors*, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by *jurymen*, in making default when summoned, refusing to be sworn or to give any verdict, eating or drinking

ing without leave of the court, and especially at the cost of either party, but not in the mere exercise of their judicial capacity, as by giving a false or erroneous verdict. 5. Those committed by *witnesses*, in making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by *parties to any proceedings* before the court; as by disobedience to any rule or order made in the progress of a cause, by non-payment of costs awarded by the court, or by non-observance of an award duly made by arbitrators after having entered into a rule for submitting to such award. 7. Those committed *in the face of the court*, as by rude and contumelious behaviour, by obstinacy or prevarication, by breach of the peace or other disturbance; or *out of the court*, as by disobeying the king's writ, or treating with disrespect the process of the court, or by perverting such process to the purposes of malice or injustice, or by speaking contemptuously of the court acting in their judicial capacity. 4 *Black.* 284.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise elsewhere, if the judges upon affidavit see sufficient ground to suspect that a contempt hath been committed, they either make a rule on the suspected party to shew cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does, if no sufficient cause be shewn to discharge the original rule, and thereupon the court confirms and makes it absolute. *Id.* 286.

This process of attachment is merely intended to bring the party into court; and when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. If he can clear himself upon oath, he is discharged; but, if perjured, he may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment. *Id.*

There is also a *foreign attachment*; which is an attachment of the goods of foreigners within a liberty or city, at the suit

ot any within the liberty, to whom the foreigner oweth money, or the like.

Court of attachments, is a forest court, to be holden once in every forty days, to inquire of all offenders against the king's deer or covert for the same; who may be attached by their bodies, if found in the very act of transgression; otherwise, by their goods. And in this court, the foresters are to bring in their attachments or presentments of vest and venison; and the verderors are to receive the same, and to inroll them, and to certify them under their seals to the court of *justice-seat* or *swain-mote*: for this court can only inquire of, but not convict, offenders. 3 *Black.* 71.

ATTAINDER is, where sentence is pronounced against a person convicted of treason or felony: he is then *attinctus*, tainted, or stained; whereby his blood is so much corrupted, that by the common law his children or other kindred cannot inherit his estate, nor his wife claim her dower; and the same cannot be restored or saved but by act of parliament: and therefore in divers instances, there is a special provision by act of parliament, that such or such an attainer shall not work corruption of blood, loss of dower, or disherison of heirs.

ATTAINT is a writ that lies to inquire, whether a jury of twelve men gave a false verdict; that so the judgment following thereupon may be reversed. In which case, twenty-four of the principal men of the county are to be jurors, who are to hear the same evidence which was given to the petty jury, and as much as can be brought in affirmation of the verdict, but no other against it. And if these twenty-four, who are called the grand jury, find it a false verdict, then followeth this terrible judgment at the common law upon the petty jury; that the party shall be infamous, so as never to be received to be a witness, or a juror; shall forfeit his goods and chattels; and his lands and tenements shall be taken into the king's hands; his wife and children cast out of doors; his houses prostrated; his trees rooted up; his meadows ploughed up; and his body imprisoned. And seeing all trials of real, personal, and mixed actions depend upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury. 1 *Inst.* 294.

But

But now, by the statute 23 *Hen. 8. c. 3.* the severity of this punishment is moderated, if the writ of attainr be grounded upon that statute, which inflicts the punishment of perpetual infamy, and a forfeiture of 20*l.* by each of the jurors, if the cause of action was above 40*l.*; if under that value, then of 5*l.* each. But nevertheless, the party grieved may, at his election, either bring his writ of attainr upon that statute, or at the common law. *Tr. per Pais, 222.*

But this proceeding is now intirely difused; and in the place of attainr, motions are usually made for new trials when a verdict is against evidence. 3 *Black. 390.*

ATTORNEY is he that is appointed by another to do any thing in the *turn* or stead of that other. 1 *Inst. 51.*

Attorney is either *public*, in the king's courts of record; or *private*, upon occasion of any particular business, who is commonly made by *letter of attorney*.

An attorney in the king's courts, commonly called an attorney at law, must be bound apprentice for not less time than five years; and during the whole time of service be actually employed in the proper business of an attorney. 2 *G. 2. c. 23.* 22 *G. 2. c. 46.*

No attorney or solicitor shall have more than two clerks at one time. 2 *G. 2. c. 23.*

And by the 25 *G. 3. c. 80.* every attorney shall take out a certificate annually of his admission, inrolment, or register, from the commissioners of the stamp duties, under the penalty of 50*l.*

If he shall willingly delay his client's suit, to work his own gain, the party shall recover costs and treble damages against him, and he shall be discharged from his office. 3 *Jac. c. 7.*

If he refuse a re-delivery of writings intrusted to his perusal, though some of them concern himself principally, the court, upon motion, will compel him to re-deliver them, on payment of all due to him in the cause for which they were delivered; for, if the writings were delivered for a special purpose, he shall not detain them for another demand. *Comyn. Dig. Attorney.*

He shall not be intitled to sue for the recovery of his fees, until after one month shall be expired from the time of his having delivered to his client his bill signed with his own hand. 2 *G. 2. c. 23.*

And the client, on submission to pay the whole sum that on taxation shall appear to be due, may have the bill taxed by the proper officer. If the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation: but if it shall not be less, the court may charge the attorney or client according to their discretion. *Id.*

ATTORNEY GENERAL is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal; and to file bills in the exchequer, for any thing concerning the king's inheritance or revenue.

The informations which he exhibits in matters criminal, are properly for such enormous misdemeanors as peculiarly tend to disturb his majesty's government, or to molest him in the regular discharge of his royal functions. For such heinous offenders, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. 4 *Black.* 308.

In case of *misapplication of charities*, the attorney general at the relation of some informant (who is usually called the *relator*) files *ex-officio* an information in the court of chancery, to have the charity properly established. 3 *Black.* 427.

ATTORNMENT (*turning* from one to another) is the agreement of a tenant to the grant of a feigniory or a rent, or of the donee in tail or tenant for life or years, to the grant of a remainder or reversion. 1 *Inst.* 309.

Attornment may be either by words, or writing: by words; as by saying, "I attorn to you by force of the said grant," or, "I acknowledge myself your tenant." By writing; which may be indorsed on the deed, or set down in any other writing, which is the safest way. And in both cases, the tenant may moreover deliver to the grantee a small sum of money by way of acknowledgment, that the witnesses may better remember it. The form of which said attornment in writing may be this: "I *A. B.* do hereby agree to attorn and become tenant to *C. D.* of *E.* of and for the messuage and tenement now in my possession, that is to say, lying and being in the parish of *F.* and county of *G.* and have given to the said *C. D.* sixpence in the name of attornment, and in part of rent. Witness my hand the ——— day of ——— in the year ———."

The

The title of attornment was anciently a large and difficult title; but now attornments are not so much in use as formerly: for new expedients are found out by fines to uses, by bargain and sale, by lease and release, and by deeds indented and inrolled. And by the 4 *An. c.* 16. all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual without any attornment of the tenants; provided that no such tenant shall be prejudiced by payment of rent to the grantor before notice given to him by the grantee.

And by the 11 *G. 2. c.* 29. attornment to strangers claiming title to the land shall be void; and the possession of the landlord shall not be altered thereby: provided, that this shall not affect any attornment made in pursuance of a judgment at law or decree in equity, or made with consent of the landlord, or to any mortgagee after the mortgage is become forfeited.

AUDIENCE COURT is a court of the archbishop of *Canterbury*, wherein at first were dispatched all such matters, whether of voluntary or contentious jurisdiction, as the archbishop thought fit to reserve for his own bearing. They who prepared evidence, and other materials to lay before the archbishop in order to his decision, were called *auditors*. Afterwards this court was removed from the archbishop's palace, and the jurisdiction of it was exercised by the master or official of the audience, who held his court in the consistory place at *St. Paul's*. But now the three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are and have been for a long time past united in one person, under the general name of dean of the arches, who keeps his court in Doctors Commons hall. The archbishop of *York* hath in like manner his court of audience.

AUDITA QUERELA is, where a defendant against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which hath happened since the judgment: as if the plaintiff hath given him a release; or if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record. In these and the like cases, wherein the defendant hath good

matter to plead, but hath had no opportunity of pleading it, an *audita querela* lies in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the *complaint* of the defendant hath been *heard* (*audita querela defendantis*), and then setting out the matter of the complaint, enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for *bail*, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*; which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where the party hath a good defence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now shewn by the courts in granting a summary relief upon motion in cases of such evident oppression, hath almost rendered useless the writ of *audita querela*, and driven it out of practice, 3 *Black.* 405.

AUDITOR is an officer of the king, or of some other great person, who examines the accounts of all inferior officers, and makes up a general book, which shews the difference between their receipts and charge, and their several allowances, commonly called *allocations*; as the *auditors of the exchequer* take the accounts of the king's receivers, sheriffs, escheators, collectors, and customers, and audit and perfect them. *Auditors of the impress* take the account of the mint, and of money dispatched to any one for his majesty's service. *Auditor of the receipts* is an officer of the exchequer that files the tellers bills; and, having entered them, delivers to the commissioners a certificate of the money received the week before: he makes debentures to the tellers, before they pay any money: he also keeps the black book of receipts, and sees every teller's money locked up and secured. 4 *Iust.* 106.

AVENAGE (from the Latin *avena*, oats) was a certain quantity of oats, paid by a tenant to his lord as a rent, or

in lieu of some other duties. So *avenor* is an officer belonging to the king's stables, that provides oats for his horses.

AVER, AVERIA, cattle. *Spelman* derives the word from the French *œuvre*, work; as principally denoting *working* cattle. Some deduce it from *avoir*, to have or possess, in a larger signification, extending to all cattle in general.—*Avera*, in Domesday, signifies a day's work of a ploughman, valued at 8d. (4 *Inst.* 269.)—*Aver land* seems to have been such lands as the tenants did plough and manure *cum averiis suis*, for the proper use of a monastery, or of the lord of the soil.—*Aver corn* was a rent reserved in corn; and, according to *Somner*, it signifies corn drawn to the lord's granary by the *averia* or working cattle of the tenant. Or perhaps it may denote a particular species of corn; for, in the northern parts of *England*, the word *haver* is commonly used for *oats*, in which sense it may signify corn for the lord's horses.—*Aver-penny* was money paid to be excused from such service. So also *aver-silver*,

AVERAGE is commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship during a tempest. In which case it is lawful for the master (on consultation with the mariners) to throw overboard goods, wares, guns, or whatsoever else is on board, for the preservation of the ship; and it shall be made good by average. But if the master takes in more goods than he ought, without leave of the owners and freighters, and a storm arises at sea, and part of the freighters goods are thrown overboard, the remaining goods are not subject to average; but the master shall make good the loss out of his own estate: and if the ship's tackle be lost by storm, the same is not within the average. If goods are cast overboard before half the voyage is performed, they are to be estimated at the price they cost: but if they be cast out after, then at the price as the rest are sold at the port of arrival. *Leg. Oleron.*

AVERDUPOIS (Fr. *avoir-du-pois*, to have full weight) is a weight of 16 ounces to the pound, whereas the standard weight is but 12 ounces. This averdupuis weight is allowed by

by custom, for all those sorts of goods wherein there is a refuse or waste, by way of allowance for the loss occasioned thereby.

AVERMENT, *verificatio*, is to avouch or verify the matter in hand. And it is twofold; *general* and *particular*. A *general* averment, which is the conclusion of every plea to the writ, or in bar of replications and other pleadings, containing matter affirmative, ought to be averred "and this he is ready to verify." *Particular* averments are, as when the life of tenant for life, or tenant in tail, are averred; and there, though this word *verify* be not used, but the matter avouched and affirmed, it is upon the matter an averment. 1 *Inst.* 362.

All pleas in the affirmative ought to be averred; but pleas in the negative ought not to be averred, because a negative cannot be proved. 1 *Inst.* 303.

Special pleas always advance or affirm some new fact not mentioned in the declaration, and then they must be averred to be true. But this is not necessary in pleas of the general issue; for those always containing a total denial of the facts before advanced by the other party, puts him directly upon the proof of them. 3 *Black.* 309.

Where one thing is to be the consideration of the other, though there be mutual promises, performance must be averred. As if the agreement be, that the one party shall pay so much money, on the other transferring so much stock; if either party would sue upon this agreement, the one for not paying, or the other for not transferring, the one must aver a transfer or a tender, and the other a payment or tender. 1 *Salk.* 112. But the want of this may be helped by a verdict; but not by a judgment by default. *Bur. Mansf.* 900.

In an action of debt by an administrator, the not averring that the deceased died intestate is cured by pleading over, though not by verdict. *L. Raym.* 635.

The truth of the fact may, in some cases, be averred against the fiction of law: as where the true time of suing out a *latitat* is material, it may be shewn notwithstanding the teste. *Bur. Mansf.* 966.

So, the time of signing a judgment may be shewed, in the case of *purchasers*; because they are bound only from the signing. *Id.* 967.

Delivery of a writ or warrant need not be averred, but the contrary must come on the other side. *L. Raym.* 310.

Any

Any matter out of a deed that alters the case cannot be averred. 1 *Salk.* 197.

Nor is any averment to be received against the express words of the deed or will. *Id.* 227.

But in debt upon bond for the payment of a sum of money, an averment that the bond was made upon a corrupt agreement not appearing in the bond itself, is admissible and good in pleading. 2 *Wilson*, 347.

By statute 4 *An. c.* 16. no exception or advantage shall be taken upon a demurrer, for want of averment, except the same be specially set down for cause of demurrer.

AUGMENTATION, the name of a court erected by king *Hen.* 8. for determining suits and controversies relating to monasteries and abbey lands. The intent of which court was, that the king might be justly dealt with touching the profits of such religious houses as were given to him by act of parliament. It took its name from the *augmentation* of the revenues of the crown, by the suppression of religious houses. And the office of augmentation, which hath many curious records, remains to this day, though the court hath long since been dissolved.

AUGUSTINE CANONS were a religious society that followed the rule of *St. Austin*, and came into *England* in the reign of king *Henry* the first. They wore a long black cassock, with a white rochet over it, and over that a black cloak and hood; from whence they were called *Black canons regular of St. Austin*. Of these, before the dissolution, there were about 175 houses in *England* and *Wales*.

AULA REGIS was a court established by *William* the Conqueror in his own hall. It was composed of the king's great officers of state resident in his palace, who usually attended on his person, and followed him in all his progresses and expeditions. Which being found inconvenient and burthenome, it was enacted by the great charter, *c.* 11. that common pleas shall no longer follow the king's court, but shall be holden in some certain place, which certain place was established in *Westminster-hall*, the place where the *aula regis* originally sat when the king resided in that city; and there it hath ever since continued. 3 *Black.* 37. *Aula ecclesie*, was the nave or body of the church, where the temporal courts were frequently holden of ancient time.

AULNEGER (from *ulna*, an ell in length) was an ancient officer appointed by the king, with a salary, whose business it was to measure all cloth made for sale, that the king might not be defrauded of his customs and duties. This office was abolished by the statute 11 & 12 W. c. 20.

AUNCEL WEIGHT (quasi *hand-sale* weight, or from *ansa*, the handle of a balance) was an ancient manner of weighing, by hanging of scales or hooks at each end of a beam or staff, which by lifting up in the middle with one's finger or hand, discovered the equality or difference between the weight at one end, and the thing weighed at the other. This weighing being subject to great deceit, was prohibited by several statutes, and the even balance enjoined in its stead. But notwithstanding, it is still used in some parts of *England*; and what we now call the *stiliards* (a sort of hand weight among butchers), being a small beam with a weight at one end, which shews the pounds by certain notches, seems to be near the same with the *auncel weight*.

AVOIDANCE of an ecclesiastical benefice, as opposed to *plenarty*, is, where there is a want of a lawful incumbent. And this happens several ways :

1. The most usual and known means, by which any spiritual promotion doth become void is, by the *act of God*, namely, by the *death* of the incumbent thereof. Of this the patron is obliged to take notice at his peril in order to prevent a lapse, and not to expect an intimation from the ordinary. *Watf. c. 1.*

2. By *resignation*, which is the *act of the incumbent*. And this being necessarily made into the hands of the ordinary, and not valid but as admitted by him; the avoidance consequent upon it is to be notified by the ordinary to the patron. *Gibf. 792.*

3. By *cession*, or the acceptance of a benefice incompatible, which also is the *act of the incumbent*. In which case, the benefice, if of 8l. a year or upwards in the king's books, is void by act of parliament; and no notice is needful. *Watf. c. 2.*

4. By *deprivation*, which is the *act of the ordinary*: which avoidance being created by sentence in the ecclesiastical court, must be notified to the patron. *Gibf. 792.*

5. By *act of the law*: As, in case of simony; not subscribing the articles or declaration; or not reading the articles

ticles or the common prayer : all which being voidances by act of parliament, are to be understood (with regard to the times of commencement of such voidances, and the notice of them) according to the directions of the respective acts. *Id.*

AVOWRY is, where one takes a distress, and the person distrained sues a replevin, then he that took the distress must *avow* and justify in his plea for what cause he took it, if he took it in his own right ; and this is called an *avowry* : if he took it in the right of another, then, when he hath shewed the cause, he must make *conusance* of the taking, as bailiff or servant to him, in whose right he took it. *T. L.*

AURUM REGINÆ, the queen's gold ; an ancient perquisite belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privilege, grant, licence, pardon, or other matter of royal favour, conferred upon him by the king ; and it is due in the proportion of one-tenth part more, over and above the intire sum paid to the king. As if 100 marks in silver be given to the king to have a fair, market, park, chase, or free warren, there, the queen is intitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginae*. 1 *Black.* 219.

AUSTURCUS, a goshawk ; anciently reserved in many manors as a rent to the lord.

AUTER DROIT, another's right : where persons sue or are sued, or claim not in their own right, but in the right of another ; as executors and administrators.

AUTERFOITS *acquit*, a former acquittal, is a special plea in bar of an indictment, when a person hath been formerly indicted of the same offence, and acquitted ; for no man shall be brought into jeopardy of his life more than once for the same offence. Of the like sort is the plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was given thereupon, as being suspended by the benefit of clergy or other cause. *Auterfoits attaint*,

attaint, a former attainder, either for the same or any other felony, is another plea in bar; for the offender having by the attainder forfeited all that he had, it would be absurd to endeavour to attain him a second time. 4 *Black.* 335.

AUTER VIE. See PUR AUTER VIE.

AWARD. See ARBITRATION.

AYLE (of the French *aieul*, *avus*, a grandfather) is a writ which lieth where a man's grandfather was seized of lands and tenements in fee simple the day that he died, and a stranger abateth and entereth upon the same, and dispossesses the heir of his inheritance. 1 *Inst.* 160.

B A C

BACHELOR, *baccalaureus*, from the French *bachelier*, a learner. In the universities, there are bachelors of arts, and the like, being an inferior degree, before they attain to higher dignity. And those that are called bachelors of the companies in *London*, are such of each company as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the 12 companies consists of a *master*, two *wardens*, the *livery*, and the *bachelors*. There are also *knights bachelors*, who are the lowest order of knighthood, and are commonly termed knights singly, whereas others have an honorary addition, as knights of the bath, knights of the garter, and the like.

BACKBEREND is, where the thief is apprehended with the things stolen in his possession, *bearing* them in a fardel at his *back*; which was also called being taken with the *mainour*, as having the goods in his *hand*. 2 *Inst.* 188. It was one of the four circumstances wherein a forester might arrest the body of a trespasser in the forest; viz. *dog-draw*, that is, drawing after a deer that he has hurt; *stable-stand*, that is, his standing, with a knife, gun, bow, or greyhound, ready to shoot or course; *back-berend*, that is, carrying away upon his back the deer which he had killed; *bloody-hand*, that is,

is, when he hath shot or coursed, and is imbrued with blood. 4 *Inst.* 294.

BACKING a warrant of a justice of the peace is, where a warrant having been granted in one jurisdiction, is required to be executed in another; as where a felony hath been committed in one county, and the offender resides in another county: in which case, on proof of the hand-writing of the justice who granted the warrant, a justice in such other county indorses or writes his name on the back of it, thereby giving authority to execute the warrant in such other county.

BAIL (from the French *bailler*, to deliver) signifies the freeing or setting at liberty a person arrested or imprisoned upon any action, on surety taken for his appearance, at a day and place certain.

Bail is either *common* or *special*. *Common* bail is a matter of course, being nothing but a mere form upon appearance: for after personal service of the writ upon the defendant, and notice in writing delivered to him to appear by his attorney in court to defend the action, if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance, which sureties are called *common bail*, being only two imaginary persons, as *John Doe* and *Richard Roe*. Or, if the defendant doth not appear on the return of the writ, or within four (or in some cases eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.— 3 *Black.* 287.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to 10l. or upwards, then in order to arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail*, it is required that the true cause of action be expressed in the body of the writ or process: and the precise sum sworn to is marked upon the back of the writ, and the sheriff or his bailiff is then obliged actually to arrest or take into custody the body of the defendant, and to certify the same with the return of the writ. 3 *Black.* 287, 8.

And in this case, the intention of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his

his person, or takes sufficient security for his appearance; in the manner whereof is, that the defendant enters into a bond or obligation to the sheriff, with one or more sureties, not fictitious persons (as in the case of common bail) but real and substantial bondsmen, to insure the defendant's appearance at the return of the writ; which obligation is called the *bail bond*. The sheriff, if he pleases, may let the defendant go without any sureties, but then it is at his own peril, for, after once taking him, the sheriff is bound to keep him safely so as to be forthcoming in court, otherwise an action lies against him for an escape. *Id.* 290.

The sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and indorsed on the back of the writ. *Id.*

The affidavit must be positive, and not that the defendant was indebted to the plaintiff in such a sum, as appears by agreement bearing date such a day, or the like: for the act of parliament, 12 *G. c.* 29. requires positive oath of the debt; whereas such affidavits cannot be said to be positive oaths of it, being only expressed in words of reference to somewhat else, and not in terms of absolute assertion. *Bur. Mansf.* 1447.

But in the case of an assignee under a commission of bankruptcy, where the assignee swore that the defendant was indebted to him in such a sum, *as appears by the bankrupt's books, and as the plaintiff verily believes*, this was held to be sufficient, being as certain as the nature of the thing will admit of: so, in like manner, when the plaintiff is executor or administrator. *Id.* 2283.

And where the original demand doth not require special bail, the addition of costs will not alter the case; *Str.* 975. that is, according to the practice of the court of king's bench.

Thus in the case of *Palmer and Needham*, *E. 3 G. 3. B. R.* the original demand was only 3*l.* 13*s.* 6*d.* The plaintiff brought an action for it, and obtained judgment, with costs. The debt and costs amounted to above 10*l.* The plaintiff then brought an action upon this judgment, and held the defendant to special bail. But the court ordered the special bail to be discharged, and common bail to be accepted; the intention of the law being only, that special bail should be required where the original debt amounted to 10*l.* or upwards. *Bur. Mansf.* 1389.

And in the case of *Belither and Gibbs*, *T. 7 G. 3. B. R.* where the original debt was 3*l.* 9*s.* 6*d.* and by the addition
of

of costs it was swelled up to 14l. the court accepted of common bail, and this was said to be the constant practice in the court of king's bench, but that the court of common pleas required special bail. But in order that there should be a uniformity between the two courts, lord *Mansfield* said, that he had laid this matter before all the judges, and that they all thought the practice of the king's bench to be the more reasonable, and more agreeable to the act of parliament; and that he believed the court of common pleas would alter their practice. *Id.* 2118.

Notwithstanding which determination, afterwards in the case of *Nightingale* and *Nightingale*, *E.* 19 G. 3. in the common pleas, on a judgment of nonsuit, the costs recovered by the defendant amounting to more than 10l. he brought an action on the judgment, and held the plaintiff in the original action to bail. On motion to discharge the *now* defendant on a common appearance, the cases of *Palmer* and *Needham*, and *Belither* and *Gibbs*, were cited, and relied on; particularly the latter, and the conference which lord *Mansfield* is reported to have said he had had with all the judges. And it was agreed, that if the defendant was not to be held to bail where part of the 10l. arose from costs, *a fortiori* he ought not, where (as in the present case) the whole demand arose from costs alone.—But by the whole court, no instance has been shewn where *this* court has refused to hold to special bail, where the whole or part of the demand (upon which the action upon judgment is brought) arises from the recovery of costs; but a multitude of cases the other way: and we see no reason to depart from the practice of the court.—Costs recovered for a groundless prosecution are as fair a debt as for any other consideration. And, by *Gould, J.*, the reporter in *Belither* and *Gibbs* must have mistaken lord *Mansfield*, for I was then a judge in this court, and remember no such conference. *Black. Rep.* 1274.

Upon the return of the writ, or within four days after, the defendant must appear according as the writ requires. This appearance is effected by putting in and justifying bail to the action, which is commonly called putting in bail *above*. This must be done either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose (not being an attorney or solicitor) by the statute of 4 *W. c.* 4. which must be transmitted to the court. These bail must enter into recognizance in court, or before the judge or commissioner,

whereby they jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him: which recognizance is transmitted to the court, in a slip of parchment intituled a *bail-piece*. And, if required, the bail must, before the court, or commissioner as aforesaid, swear themselves housekeepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts. 3 *Black.* 290, 1.

These bail must be *two* in number; for by the court of C. B. in *Allen and Keyt*, *M.* 17 *G.* 3. notice given to justify *three* bail is irregular. You may as well give notice of threescore, and send the plaintiff to inquire after them all over *London*. *Blackstone's Rep.* 1122.

And to prevent oppressions by sheriffs' officers, the courts will not accept of *them* as bail. 2 *Salk.* 890.

Form of a Bail-Bond to the Sheriff.

"KNOW all men by these presents, that we *A. B.* of —, in the county of —, gentleman; *C. D.* of —, in the said county, yeoman; and *E. F.* of —, in the said county, carpenter; are held and firmly bound to *G. H.* esquire, sheriff of the county of —, in — pounds (the sum sworn to) of lawful money of Great Britain, to be paid to the said sheriff, or to his certain attorney, his executors, administrators, or assigns: For which payment well and truly to be made, we bind ourselves and each of us by himself, for the whole, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the — day of —, in the — year of the reign of our sovereign lord George the third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord —

"The condition of this obligation is such, that if the above-bound *E. F.* do appear before [**the justices of*] our sovereign lord the king at Westminster, on the morrow of the Holy Trinity, to answer *J. K.* gentleman, of a plea of debt of — pounds (the sum expressed in the body of the writ); then this obligation shall be void, or else shall be and remain in full force and virtue."

* If in the king's bench, these words must be omitted.

Recog-

Recognizance of Bail before a Commissioner.

" YOU *A. B.* do acknowledge to owe unto the plaintiff
 " — pounds, and you *C. D.* and *E. F.* do severally ac-
 " knowledge to owe unto the same person the sum of —
 " pounds a-piece, to be levied upon your several goods and
 " chattels, lands, and tenements; upon condition, that if
 " the defendant be condemned in this action, he shall pay
 " the condemnation, or render himself a prisoner in the
 " Fleet for the same; and if he fail so to do, you *C. D.* and
 " *E. F.* do undertake to do it for him."

The Bail-Piece.

" Trinity Term, 16 Geo. 3.

" Berks, } ON a *testatum capias* against *A. B.* late of —,
 " (to wit.) } in the county of —, gentleman, returnable
 " on the morrow of the Holy Trinity, at the suit of *J. K.*
 " of a plea of debt of — pounds:

" The bail are *C. D.* of —, in the county of —,
 " yeoman, and *E. F.* of —, in the said county, carpenter.

" *R. P.* attorney }
 " for the defendant. }

" The party himself in 400*l.*

" Each of the bail in 200*l.*

" Taken and acknowledged the — day of —, in the
 " year of our Lord —, *de bene esse*, before me,

" *R. G.* one of the commissioners."

3 *Black.* Append.

The above may give a general idea of the nature of bail; but as the forms differ not only in the different courts, but according to the species or cause of action in the same court, the books of practice must be consulted.

In criminal cases.—To refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law, as well as by the statute 3 *Ed. 1. c. 15.* and the *habeas corpus* act, 31 *C. 2. c. 2.* And lest the intention of the law should be frustrated by requiring bail to a greater amount than the nature of the case demands, it is declared by statute 1 *W. 3. c. 1.* that excessive bail ought not to be required. On the other hand, if the magistrate takes insufficient bail, he is liable to be fined if the criminal doth not appear. 4 *Black. 297.*

Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by justices of the peace.

By the ancient common law, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute 3 *Ed. 1. c. 15.* aforesaid, takes away the power of bailing in treason; and in divers instances of felony. The statutes 23 *Hen. 6. c. 9.* and 1 & 2 *P. & M. c. 13.* gave farther regulations in this matter. And, upon the whole, we may collect, that no justices of the peace can bail, 1. Upon an accusation of treason. Nor, 2. Of murder. Nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if an indictment be found against him. Nor, 4. Such as being committed for felony have broken prison. 5. Persons outlawed. 6. Such as have abjured the realm. 7. Approvers; namely, such as having confessed the felony undertake to prove another guilty of the same crime; and persons by them accused. 8. Persons taken with the mainour, or in the fact of felony. 9. Persons charged with house-burning. 10. Persons taken by writ of *excommunicato capiende*.—Others are of a dubious nature, being in the discretion of the justices whether bailable or not: As, 1. Thieves openly defamed and known. 2. Persons charged with other felonies, or manifest enormous offences, not being of good fame. 3. Accessaries to felony, that labour under the same want of reputation.—A third class are those that are clearly bailable, upon offering sufficient surety; viz. 1. Persons of good fame, charged with a bare suspicion of manslaughter or other inferior homicide. 2. Persons charged with petit larceny or any felony not before specified. 3. Accessaries to felony not being of evil fame, nor under strong presumptions of guilt.

BAILMENT is properly a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered to a taylor to make a suit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If goods be delivered to a common carrier, he is under a contract to carry the goods to the place appointed. If a horse be delivered to an innkeeper or his servants, he is bound to keep him safely, and restore him when his guest leaves the house. So if a friend

friend deliverers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held, that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise, unless he expressly undertook to keep it only with the same care as his own goods, and then he shall not be answerable for theft or other accident; but now it is settled, that he shall not be answerable for any loss, except what happens by gross neglect. 2 *Black.* 452.

But the case of a carrier, innkeeper, or the like, is different; for they have their hire, and thereby impliedly undertake the safe delivering of the goods intrusted with them; and therefore they shall answer the value, if the goods are stolen from them. *Wood. b. 4. c. 4.*

BAILIFF is an old *Saxon* word, and signifies a safe keeper or protector; as *bail* is safe keeping or protection. And thereupon we say, when a man upon surety is delivered out of prison, he is delivered into bail, that is, into their safe keeping or protection from prison; and the sheriff, that hath the custody of the county, is called *ballivus*, and the county *balliva sua*. 1 *Inst.* 61.

But this word is most commonly applied to the sheriffs' officers, who are either *bailiffs of hundreds*, or *special bailiffs*. *Bailiffs of hundreds* are officers appointed by the sheriff over those respective districts; to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. *Special bailiffs* are usually joined with the others upon special occasions; as for arresting persons in cases of difficulty or danger, or to execute some particular writ, and for that time only. 1 *Black.* 345.

Bound bailiffs are also sheriffs' officers, and are usually bound in a bond to the sheriff for the due execution of their office, and thence are called *bound-bailiffs*, which the common people have corrupted into a much more homely appellation. 1 *Black.* 345.

BAILIWICK, in the language of the king's writs, signifies the same as *county*; as where the sheriff is commanded not to omit, by reason of any liberty within his bailiwick, to enter and execute such a writ: sometimes the word *bailiwick* is used to denote such liberty or franchise itself, which is generally exempted from the sheriff's jurisdiction, where

the lord of the franchise exercises like authority as the sheriff within his county.

BAN is a Saxon word, and signifies proclamation or public notice. It is most especially used in the publication of intended marriages; which must be done on three several Sundays previous to the marriage, to the end, that if any can shew just cause against such marriage, they may have opportunity to make their objections. But the spiritual judge by a licence may dispense with the formality of publication. But if any persons shall be married without either publication of bans or licence, the marriage shall be void, and the minister officiating shall be transported. 26 G. 2. c. 33.

BANISHMENT. By the common law, every *Englishman* may claim a right to abide in his own country so long as he pleases, and not to be banished or driven from it but by sentence of the law. The king, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence; but no power less than the authority of parliament can send any subject out of the land against his will, no not even a criminal; for wherever banishment or transportation is inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or by the express direction of an act of parliament. By the great charter, c. 29. it is declared, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 C. 2. c. 2., no subject of this realm, who is an inhabitant of *England, Wales, or Berwick*, shall be sent prisoner into *Scotland, Ireland, Jersey, Guernsey*, or place beyond the seas, where they cannot have the benefit and protection of the common law, but all such imprisonment shall be illegal. And the law in this respect is so liberally construed for the benefit of the subject, that, though *within* the realm, the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service, except sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy, or lieutenant of *Ireland* against his will, nor make him a foreign ambassador; for this might, in reality, be no more than an honourable exile. 1 *Black.* 137.

BANK

BANK (*bancus*, Lat. *banque* Fr.), is sometimes used to denote the *bench* or seat of judgment, as *bank le roy*, the king's bench; *bank le common pleas*, the bench of common pleas, or the common bench; called also in Latin *bancus regis*, and *bancus communium placitorum*.—There is another sort of *bank*, which signifies a place, where a great sum of money is let out to use, returned by exchange, or otherwise disposed of to profit: and the *bank of England*, emphatically so called, established by act of parliament, under the management of a governor and directors, with funds for maintenance thereof, appropriated to such persons as are intitled to a share of the subscription money. There are also *private bankers*, in whose hands money is lodged and deposited for safety; to be drawn out again as the owners shall call for it.

BANKS DESTROYING. By the 9 G. c. 22. if any person shall unlawfully and maliciously break down the head or mound of any fish pond, whereby the fish shall be lost or destroyed; or break down or cut down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; he shall be guilty of felony without benefit of clergy.

BANKRUPT: by several acts of parliament, every person using the trade of merchandize, by way of bargaining, exchange, barter, chevifance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, or that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, who shall (1) depart the realm; or (2) begin to keep his house, or otherwise to absent himself; or (3) take sanctuary; or (4) suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes; or (5) shall suffer himself to be outlawed; or (6) yield himself to prison; or (7) willingly or fraudulently shall procure himself to be arrested, or his goods to be attached or sequestred; or (8) depart from his dwelling house; or (9) make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts; or (10) shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament;

parliament; or (11) shall prefer to any court any petition or bill against any of his creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time or longer days of payment than was given at the time of their original contract; or (12) being arrested for debt, shall lie in prison two months; or (13) being arrested for 100l. or more, shall escape out of prison—shall be adjudged a bankrupt (and in the said cases of arrest, or lying in prison, from the time of his first arrest).

But no commission of bankruptcy shall be issued on the petition of one or more creditors, unless the single debt of such creditor, or of two or more being partners, amount to 100 l.; or of two such creditors petitioning amount to 150l.; or of three or more to 200l.

On such petition the Lord Chancellor may by commission under the great seal appoint such persons as he thinks fit to be commissioners; which commissioners shall cause notice to be given in the Gazette of the commission being issued, and notice thereof also to be given to the bankrupt.

In which notice they shall appoint a time and place of meeting of the commissioners; which shall be at three several times within forty-two days, the last of which, shall be on the forty-second day: within which time the bankrupt shall surrender himself and discover his effects.—But the Lord Chancellor, if he see cause, may enlarge the time of surrender from the end of the said forty-two days for any further time not exceeding fifty days.

At the said first meeting, the creditors shall be admitted before the commissioners to prove their debts; and the major part in value of the creditors (each of whose debt amounts to 10l. or upwards) shall choose assignees of the bankrupt's estate and effects.

And the bankrupt shall deliver to the assignees, upon oath, an account of his effects; and for that purpose they shall have liberty to inspect his books and papers: and if he shall refuse to answer, or not answer fully all lawful questions of the commissioners, they may by their warrant commit him to prison till he shall submit to them and full answer make.

And in case he shall not surrender within the time limited, and also submit to be examined, and in all things conform and fully discover all his estate, and how disposed of, except what hath been *bona fide* disposed of in the way of his trade and dealing, or in the ordinary expence of his family,
and

and also deliver up all his effects (except the necessary wearing apparel of himself and wife and children); he shall be guilty of felony without benefit of clergy.

And the commissioners shall have power by sale to dispose of all his lands, as well copy or customary hold as freehold; and all his goods, chattels, wares, merchandize, and other personal effects: and also his estate tail which he might cut off by common recovery. And they may break open doors, trunks, and chests, where any of the goods are reputed to be. And they may state accounts between the bankrupt and his debtors or creditors, and the balance only shall be paid on either side. And, with consent of the major part in value of the creditors, they may submit disputes to arbitration, and compound for debts owing unto him.

A landlord may distrain for his rent upon the bankrupt's goods, either before or after the assignment; but if he neglects to do it, and suffers them to be removed, he can only come in upon an average with the rest of the creditors. But if the goods remain on the premises, he may distrain them, even after sale by the assignees. And he is not restricted to one year only as in the case of executions, but may distrain for his whole arrear. (1 Atk. 102.)

The assignees shall, after four months, and within twelve months after issuing the commission, cause twenty-one days notice to be given in the Gazette of a dividend to be made. And in eighteen months they shall in like manner make a second dividend.

And the bankrupt, if he has conformed in due manner, shall be allowed 5 l. *per cent.* if his estate will pay 10 s. in the pound; so as the said 5 l. *per cent.* amount not to above 200 l. And if his estate will pay 12 s. 6 d. in the pound, he shall be allowed 7 l. 10 s. *per cent.* so as it amount not to above 250 l. And if his estate will pay 15 s. in the pound, he shall be allowed 10 l. *per cent.* so as it amount not to above 300 l. If his estate will not pay 10 s. in the pound, he shall be allowed so much as the commissioners and assignees shall think fit, not exceeding 3 l. *per cent.*

But he shall not be intitled to this allowance, unless the commissioners shall certify to the Lord Chancellor that he hath duly conformed; and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20 l. each, shall sign the said certificate, and testify their consent to the said allowance.

And

And moreover he shall not be intitled to the said allowance, if he hath upon marriage of any child given above 100 l., unless he prove by his books or upon his oath that he had remaining at the time sufficient to pay his debts; or if he hath lost in one day the value of 5 l. or in the whole the value of 100 l. in twelve months next before his becoming bankrupt at any sort of gaming, or 100 l. in stock jobbing.

Finally, if the bankrupt's estate will pay 15 s. in the pound, he shall be discharged from all the debts by him owing at the time he became a bankrupt: otherwise, if it will not pay 15 s. in the pound, his body only shall be free from arrest, but his future estate shall be liable, except the tools of his trade, necessary household goods and furniture, and wearing apparel of himself and family.

BANNERET is a knight created by the king in person in the field, under the royal banner, in time of open war: and, being so created, he ranks next after the degree of nobility.

BANNITUS, an outlaw, or *banished* man. So, *bannitus fortis* was a stout desperado, called in our ancient vagrant acts a *valiant beggar*, the same as is stigmatized by our present vagrant act with the appellation of *incorrigible rogue*.

BAR, in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action.

In *real* actions, a general release, or a fine, may be pleaded to bar the plaintiff's title. In *personal* actions, an accord, arbitration, conditions performed, non-age of the defendant, may be pleaded in bar. So the statute of limitation may be pleaded in bar, or the time limited by law, beyond which no plaintiff can lay his cause of action. 3 *Black.* 306.

In *criminal* cases, there are especially four pleas in bar, which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. And these are, 1. A former *acquittal*, grounded on this universal maxim of the common law, that no man shall be brought into jeopardy of his life more than once for the same offence. 2. A former *conviction*, though no judgment was given, nor perhaps will be given; and this depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. 3. A former *attainder*;

tainder; for being dead in law by such first attainder, he hath forfeited all he had, and it would be superfluous to attain him a second time. 4. A *pardon*; which at once destroys the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict. 4 *Black.* 329.

BARGAIN AND SALE of *lands* is a kind of real contract, whereby the seller, for some pecuniary consideration, bargains and sells, that is, contracts to convey, the land to the purchaser, and becomes by such bargain a trustee for, or seised to the use of the purchaser; that is to say, the bargain first vests the use, and then the statute of uses vests the possession. But as conveyances, thus made, want all those benefits of notoriety, which the old common law assurances were calculated to give, therefore to prevent clandestine conveyances of freehold, it is enacted by the 27 *H.* 8. c. 16. that such bargains and sales shall not enure to pass a freehold, unless the same be made by indenture, and inrolled within six months in one of the courts at *Westminster*, or with the *custos rotulorum*, or two justices of the peace, and the clerk of the peace of the county where the lands lie. 2 *Black.* 338.

But now the most common species of conveyance is by lease and release; wherein the lease, without any inrollment, makes the seller stand seised to the use of the purchaser, and vests in the purchaser the use of the term, and then the statute of uses immediately annexes the possession, and thereby renders him capable of receiving a release. And this is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment. *Id.*

BARGAIN AND SALE of *goods*. See **CONTRACT**.

BARON is of the lowest order of nobility, but in point of antiquity the highest. Barons originally seem to have been the same as our present lords of manors; to which the name of *court baron* (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from king *John's magna charta*, that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament; till about the reign of that prince the conflux of them became so large and inconvenient, that the king was obliged to divide them, and
summon

summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till *Richard* the Second first made it a mere title of honour, by conferring it on divers persons by letters patent. 1 *Black.* 399.

BARON-COURT is a court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor. It is not a court of record: and therefore county-courts, hundred-courts, and the like, are not of record, because they are but courts-baron. A court-baron is an inseparable incident to a real manor; not to a nominal manor, where the real manor hath been once destroyed by granting away the demesnes or services. A court-leet is not incident to a manor; but he that hath such a manor may also have a court-leet, to be holden within his manor, by prescription or grant from the king.

A court-baron must be holden on some part of the manor. For if it is holden out of the manor, it is void; unless there is a custom to hold courts at one manor for all, where the lord hath several manors.

This court is of two natures: 1. By *common law*, which is the freeholders court, or the court-baron that is incident to every manor, of which the freeholders being suitors are the judges, and the steward only register. It cannot be a court-baron without two suitors at least. This court may be kept from three weeks to three weeks. 2. By *custom*, which is called the customary-court, though it is kept but very seldom. This concerns customary tenants and copyholders, whereof the lord or his steward is judge.

The *freeholders* court consists in hearing complaints of copyhold tenants for debt under 40 s. The process is the same as in the county-court, by distress infinite. Causes may be removed by the plaintiff out of this court by *tolt* to the county-court, and from thence by *pone* into the common pleas: or they may be removed by the defendant by *recordare* into the king's bench or common pleas. Executions are only by distress and impounding till the party is satisfied. There is no

power to sell, or to deliver the distress to the party; neither is the body to be taken in execution.—A common recovery may be had in this court.

The *copyholders* or *customary-court* is for grants and admittances upon surrenders and descents, on the presentment of the homage or jury. The homage may inquire of all persons that owe suit to this court and make default, and present their names. It may inquire of the death of tenants after the last court, and who is next heir; of fraudulent alienations of land to defeat the lord of his profits; of incroachments on any of the lands of the lord without licence; of cutting down trees by the copyholder without custom or licence; of the copyholder's suffering his houses to decay and not repairing them; of suit not performed at the lord's will by reason of tenure; of surcharge of common with commonable beasts, or putting beasts upon the common that are not commonable; of trespass in the common or waste of the lord by digging, building, or inclosure; of rescous and pound breach; of removing mere stones or land-marks; of by-laws or orders not observed. The method of punishment is by amercement; and after the amercement hath been assessed or moderated by three sworn assessors, the lord may have an action of debt in his court-baron for the amercement assessed. *Wood, b. 4. c. 1.*

BARON AND FEME, in our law French, are used for husband and wife. And forasmuch as the wife is under the protection and influence of her *baron*, lord, or husband, she is therefore stiled a *feme-covert*, and her state of marriage is called her *coverture*. See HUSBAND and WIFE.

BARONET is a dignity or degree of honour, next after barons, having precedency of all knights, except knights bannerets created by the king under the royal standard. Baronets were first instituted by king *James* the first, in order to raise a competent sum for the reduction of the province of *Ulster* in *Ireland*; for which reason all baronets have the arms of *Ulster* superadded to their family coat. They are created by letters patent, and the dignity usually descends to the issue male.

BARONY, *baronia*, is that honour and territory which gives title to a baron; comprehending not only the fees and lands

lands of *temporal* barons, but of *bishops* also, who have two estates, one as they are spiritual persons, by reason of their spiritual revenues and promotions, the other grew from the bounty of our kings, whereby they have baronies and lands added to their spiritual livings and preferments. *Bracton* says, a barony is a right indivisible; and therefore, if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet if a capital messuage be the head of a barony, it may not be parcelled.

BARRATRY is a word which we have received from the Danes, or Normans, or both; for *baratta* in the Danish, and *baret* in the Norman, do equally signify a quarrel or contention. And a barrator, in legal acceptation, signifies a common mover, exciter, or maintainer of suits or quarrels between his majesty's subjects, either at law or otherwise.

An indictment of barratry is good, without alleging the offence at any certain place; because, from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places. 1 *Harv.* 244.

The punishment for this offence, in a common person, is fine and imprisonment: but if the offender belongs to the profession of the law, he ought to be disabled from practising for the future. And by the statute 12 *G. c.* 29. if any man, who hath been convicted of common barratry, shall practise as an attorney or solicitor in any suit, the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years.

BARRISTER is a counsellor learned in the law, admitted to plead at the *bar*. In our old law books, barristers are styled *apprentices*, *apprentitii ad legem*, being looked upon as learners, and not qualified until after a considerable tending in the inns of court to be called to the degree of serjeant.

BARROW, from the Saxon *beorg*, an hill, an heap of earth, is a large hillock or mount, raised or cast up in many parts of *England*, called by the Romans *tumulus*, being the repository of the remains or ashes of the dead.

BARTON lands are in some places used to denote the demesne lands of a manor.

BAS, low, or inferior. So *bas chevalier* is an inferior knight, as distinguished from bannerets or knights superior. *Bas court*, an inferior court, such as is not of record, as the court baron of a manor. So *base tenure* was a holding by villenage, or other customary service, opposed to *alta tenura*, the higher tenure *in capite* or by military service. So the *base tenants* were such as had no relation to the wars, but such only as were employed in inferior occupations, as in ploughing the lord's land, making his hedges, carrying his dung, and the like. 2 *Black.* 61.

BASILLARD, a short sword or dagger.

BASSINET, *basnetum*, an helmet or other defensive covering for the head.

BASTARD:

1. Bastard, generally, is one that is born out of lawful matrimony. But, in some circumstances, children born in wedlock may be bastards: As if the husband be out of the kingdom, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 *Black.* 457.

So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244.

So where a wife is separated from her husband by a divorce *a mensa et thoro*, the children she has during the separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed: but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended.— 1 *Salk.* 123.

Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning. 1 *Inst.* 235.

2. The law hath appointed no exact certain time for the birth of a legitimate child by the widow after the death of her husband. For as a child may be born before the usual
time

time of delivery, so also may the birth of the child, by infirmity of the mother, or other accident, be delayed as long after the usual time. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate; in which case, the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether or no she be with child; and, if she be, to keep her under proper restraint till she be delivered: but if, upon due examination, she be found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within 40 weeks from the death of her husband. 1 *Black.* 456.

3. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, chuse which of the fathers he pleases. *Id.*

4. Bastardy is either *general* or *special*: *General*, where the question is, whether the father and mother were ever married: *Special*, where the question is, whether the child was born before or after the marriage of the father and mother; for by the ancient law of the church, if the child was born before marriage, yet if they married afterwards the child should be legitimate. And therefore the temporal courts would not allow the ordinary to try *special* bastardy, but this shall be determined by a jury. But *general* bastardy shall be tried in the ecclesiastical court, on the king's writ issued to the ordinary for that purpose.

5. The two next justices shall take order for the maintenance of a bastard child, by charging the mother or reputed father with payment of money weekly, or other sustentation. 18 *Eliz. c. 3.*

6. And if any single woman shall be delivered of a bastard child, or shall declare herself to be with child, a justice, on application by the parish officers, may take order for apprehending the reputed father, and may compel him to give security to indemnify the parish, or else bind him to appear at the next sessions, and also to abide such order as shall be made by the statute of the 18 *Eliz.* for the maintenance of such child.—But no woman shall be compelled to go before a justice before the birth of the child, nor till one month after. 6 *G. 2. c. 31.*

7. If

7. If the putative father or mother run away, the parish officers may, under direction of the justices, seize the goods and chattels, and the rents of the lands of such person, towards the discharge of the parish. 13 & 14 C. 2. c. 1.

8. The justices shall also take order for the punishment of the mother and reputed father of a bastard who shall be chargeable; and may commit the mother to the house of correction for a year. 18 El. c. 3. 7 Ja. c. 4.

9. Generally, the lawful settlement of a bastard is the place of its birth, unless there be some fraud or collusion. Also this rule doth not hold, where a bastard is born whilst a legal order is under execution for removal of the mother to her proper settlement; nor where the child is born in a state of vagrancy, provided the parish officers take care to have the mother apprehended and punished; nor where the child is born in prison, or in a licensed lying-in hospital.

10. A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name of reputation, he may purchase by his reputed name, to him and his heirs; though he can have no heirs but of his body. 6 Co. 65.

11. If the issue of a man who is a bastard purchase land, and die without issue, though the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother (being no bastard) it may; for the heir on the part of the mother makes not any conveyance by the bastard. Noy. 159.

12. If a bastard dies intestate, without wife or issue, the king is intitled to the personalty; and the ordinary of course grants administration to the patentee or grantee of the crown. 3 P. Will. 33. 2 Black. 505.

13. If any woman be delivered of a child, which if born alive should by law be a bastard, and endeavours privately to conceal its birth, by burying the child, or the like, she shall suffer death as in case of murder, unless she can prove by one witness at least that the child was born dead. 21 Ja. c. 27.

But of late years it hath been usual, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive. 4 Black. 198.

Bastard eigne is a son born *before* marriage, whose parents afterwards intermarry, and by the civil law he is *mulier*, or lawful issue; but not by the common law. 2 Inst.

99. and the son born *after* the marriage, (who is distinguished

guished by the addition of *mulier puisné*, I shall be heir to his father.

All the bishops intreated the lords that they would consent that all such as were born afore matrimony, should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, for so much as the church accepteth them for legitimate. And all the earls and barons with one voice answered, that they would not change the laws of the realm which hitherto have been used and approved. *St. 20 H. 3. c. 9.*

BASTON (Fr.) a staff or club.

BATH, knights of, are an order of knights instituted by king *Hen. 4.* and revived by king *Geo. 1.* They were so called from the ceremony of *batling*, the night before their creation.

BATTEL (from the Saxon *batte*, a club; or *beatan*, to beat) signifies a trial by combat, where the defendant in an appeal of murder or felony may fight with the appellant, and make proof thereby whether he be guilty or innocent of the crime. Which species of trial is of great antiquity in our laws, but now disused; there having been no instance of it since the year 1638; though still in force, if the parties chuse to abide by it.

When an appellee chuses to wage battel, the manner is this: He pleads not guilty, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join battel, he replies, that he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove: And then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this, thou who callest thyself John by the name of baptism, whom I hold by the hand, that falsely upon me thou hast lied; and for this thou liest, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name: So help me God.* And then he kisses the book, and says, *And this I will defend against thee by my body, as this court shall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears thus: *Hear this, thou who callest thyself Thomas by the name of baptism, that thou didst feloniously murder my father W. by name: So help*

help me God. And then he kisses the book, and says, And this I will prove against thee by my body, as this court shall award.

On the day appointed, both parties shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bareheaded and bare-legged from the knee downward, and with bare arms to the elbows, armed only with batons or staves, of an ell long, and a four-cornered leathern target; and before they engage, they take the following oath: *Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne grasse; nor any incantment, sorcery, or witchcraft, whereby the law of God may be abused, or the law of the devil exalted: So help me God and his saints.*

Then, after proclamation for silence, they shall begin the combat, wherein if the appellee be so far vanquished, that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he kills the appellant, or can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: And if the appellant becomes recreant or a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant for his perjury shall lose his *liberam legem*, and become infamous.

This trial by battel is at the defendant's choice, but if the plaintiff be under an apparent disability of fighting, as being an infant, or of the age of sixty, or lame, or blind, he may counterplead the wager of battel, and compel the defendant to put himself upon his country.

Also peers of the realm bringing an appeal shall not be challenged to wage battel, on account of the dignity of their persons. So likewise if the crime be notorious; as if the thief be taken with the mainour, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel from the appellee; for it is unreasonable that an innocent man should stake his life against one who is already half convicted.

This mode of trial was used not only in criminal cases on appeals of murder or felony, but also in one civil case, namely, upon an issue joined in a writ of right. And herein the form of proceeding was not much different from that on appeals of murder or felony. Only the parties did not fight in person, but by their champions: and the reason was, that if either of the parties should be killed, the suit would

abate, and no judgment could be given. But as the writ of right itself is now disused, this course of trial is only matter of speculation; although, in the case of a writ of right, the defendant hath it at this day in his election to demand it. 3 *Black.* 337. 4 *Black.* 346.

BATTERY (from the Saxon *batte*, a club; or *beatan*, to beat; from whence cometh also the word *battle*) is, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner; as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *Haw.* 134.

But battery is, in some cases, justifiable or lawful; as where one, who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence. So likewise in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and, in case he persists with violence, I may proceed to beat him away. Thus also in the exercise of an office, as that of churchwarden, a man may gently lay hands on another to turn him out of the church, thereby to prevent his disturbing the congregation. 3 *Black.* 120.

BAWDY-HOUSE is a house of ill-fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a bawdy-house comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people. 1 *Haw.* 196.

Those who keep bawdy-houses are punishable by fine and imprisonment, and also such infamous punishment as to the court in discretion shall seem proper. *Id.*

It seems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy-houses with women of bad fame, as also for keeping bad women in his own house. 1 *Haw.* 132.

And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy-

bawdy-house ; for this is an offence as to the government of the house, in which the wife hath a principal share ; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Haw.* 2.

But if a person is indicted for frequenting a bawdy-house, it must appear that he knew it to be such a house ; and it must be expressly alleged that it is a bawdy-house, and not that it is suspected to be so. *Wood, b. 3. c. 3.*

It is said, a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. 1 *Haw.* 196.

BEACON is derived of the Saxon word *becn*, a signal, and *bechnan*, to give notice or intelligence ; as we use the word *beckon* in a like signification to this day. It was a signal erected as a sea mark for the use of mariners, or to give warning of the approach of an enemy. Before the reign of *Edward* the third, there were only stacks of wood set upon high places, which were fired when the coming of enemies was descried ; but in his reign pitch-boxes were set up instead of those stacks of wood. There was an ancient payment, and yet is in some places called *beaconage*, for the maintenance of beacons and lighthouses. In the borders between *England* and *Scotland*, attending at the beacons was a personal service, to which the inhabitants in their turns were liable ; who, on their descrying the approach of the enemy, were immediately to set fire to their combustibles, whereby they could communicate intelligence in a few minutes to other beacons, and those to others again to a very great distance.

BEAD, or *beade* (Sax.), a prayer. So *beadesman* is one who says prayers for his patron, or other. So *beadroll* was a list of those who used to be prayed for in the church, and from thence transferred to signify any long tedious list, or confused reckoning up of many things together.

BEES are animals *fera natura* ; but when hived and reclaimed, a man may have a qualified property in them. It is the seizing, hiving, or inclosing them, which gives the property. For though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds that make their nests therein ; and therefore if another hives them, he shall be their proprietor : but a swarm, which fly from and out of my hive, are mine so long

as I can keep them in fight, and have power to pursue them; and in these circumstances, no one else is intitled to take them.—But it hath been also said, that the only ownership in bees is *ratione soli*; and the *charta de foresta*, which allows every freeman to be intitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found. 2 Black. 392.

BEHAVIOUR. See GOOD BEHAVIOUR.

BENEFICE is generally taken for all ecclesiastical preferments and dignities; but, in a more restrained sense, it is applied only to rectories and vicarages. We have received the word from the old Romans, who being wont to distribute part of the lands they had conquered on the frontiers of the empire to their soldiers, those who enjoyed such rewards were called *beneficiarii*, and the lands themselves *beneficia*. Hence, doubtless, came the word *benefice* to be applied to church livings; for besides that the ecclesiastics held for life, like the soldiers, the riches of the church arose from the beneficence of princes. And these *beneficia* were not given by the Romans merely as a recompence for what was past, but also as an encouragement for future service.

BENEFIT OF CLERGY. See CLERGY.

BENERETH, an ancient service which the tenant rendered to his lord with his plough and cart. Co. Lit. 86.

BENEVOLENCE was an aid given by the subjects to the king, as a voluntary gratuity; but, in truth and reality, it was an extortion and imposition: and therefore this hath been carefully guarded and provided against by several statutes. By 25 Ed. 1. c. 5, 6. it is enacted, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Ed. 1. ff. 4. c. 1. which enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land. And again, by 14 Ed. 3. ff. 2. c. 1. none shall be charged to make any aid, but by the common assent of the great men and commons in parliament. And

as this fundamental law was shamefully evaded under many succeeding princes, by compulsive loans and benevolences, extorted without a real and voluntary consent; it was made an article in the petition of right, 3 *Charles*, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the declaration of rights, 1 *W. & M.* 2. c. 2. it is insisted, that levying money for or to the use of the crown, by pretence of prerogative without grant of parliament, or for longer time, or in other manner than the same is or shall be granted, is illegal.

BENT, or *Star*, is a rush or shrub growing on the north-west coast of the kingdom; and by the 15 *G.* 2. c. 33. several provisions are made for the preservation thereof.

BERCARIA, *bercary*, in *Domesday Berquarium*, (Fr. *Bergerie*,) a sheep-fold, or other inclosure for keeping of sheep. It is said to be abbreviated from *berbicaria*, a sheep-heath, or ground whereon to feed sheep. So *berbiage* seems to have been a rent paid for the depasturing of sheep. And the whole perhaps from the Latin *vervex*, a wether sheep. Hence have been framed *berbicus*, a ram; *berbica*, an ewe; *cara berbicina*, mutton; *bercarius*, a shepherd. 2 *Inst.* 476. *Cowel*.

BERRA, *beria*, *berry*, a plain open field or heath. Such cities and towns in *England* which end with that word, are built in plain and open places, and derive their names from thence.

BERWICK was originally part of *Scotland*, and, as such, was for a time reduced by king *Edward* the first into the possession of the crown of *England*; and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by *Edward Baliol* to be for ever united to the crown and realm of *England*) was confirmed by king *Edward* the third, with some additions; particularly, that it should be governed by the laws and usages which it enjoyed during the time of king *Alexander*, that is, before its reduction by *Edward* the first. Its constitution was afterwards new modelled, and put upon an *English* footing by a charter of king *James* the first; and all its liberties, franchises, and customs were confirmed in parliament by the statute 2 *Ja.* c. 28. Though therefore it hath some

local peculiarities, derived from the ancient laws of *Scotland*, yet it is part of the realm of *England*, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or not. And by way of corroboration, it is enacted by 20 G. 2. c. 42. that where *England* only is mentioned in any act of parliament, the same shall be deemed to comprehend the dominion of *Wales* and town of *Berwick* upon *Tweed*. 1 *Black.* 98.

BESAYLE is a writ directed to the sheriff, in case of an abatement or disseisin, to summon a jury to view the land in question, and to recognize whether the great grandfather (*besayle*) of the demandant died seized of the premises, and whether the demandant be his next heir. If the abatement was in the time of the grandfather, then the writ was a writ of ayle (*de avo*); if in the time of a nearer ancestor, then the remedy was by a writ of *mort d'ancestor*. 3 *Black.* 185.

BIDALE, the *bidding* or inviting of friends to drink at the house of some poor man, in order to raise a charitable contribution for his relief.

BIDDING OF THE BEADS, from the Saxon *biddan*, to desire, and *bede*, a prayer, was anciently a charge or warning given by the parish minister to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion: and, at this day, the giving notice on the *Sunday* before of an holiday to be observed in that week is called *bidding* the holiday.

BIGAMY is commonly applied to persons that have two husbands or two wives at one and the same time; and herein it is confounded with *polygamy*: whereas *bigamy*, in its proper acceptation, signifies the having two husbands or two wives successively.

BILL OF EXCEPTIONS. If the counsel of either party, in the hearing and determining of a cause, apprehend that the judge, either in his directions or decisions, mistakes the law, they may require him to seal a *bill of exceptions*, stating the point wherein he is supposed to err.— 3 *Black.* 372. 2 *Inst.* 426.

Which

Which bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at nisi prius, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. 3 *Black.* 372.

The exception should be insisted on at the trial, and the party shall not resort back to it after a verdict against him, when perhaps, if he stood upon the exception, the opposite party had other evidence, and needed not to have put the cause upon this point. The exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing whilst the thing is transacting, because it is to become a record. 1 *Salk.* 288.

This bill of exceptions is given by the statute of 13 *Ed. 1. c. 31.* which statute extends to civil cases only, and not to criminal: otherwise there would be no trials of that nature ever dispatched in any reasonable time, if every frivolous exception which a prisoner would make should be drawn up into a bill of exceptions: besides, the court is always so far of counsel with the prisoner, as to see that he hath right; and if they find any thing doubtful, they of themselves will take time to advise. *Kelyng.* 15.

Also a bill of exceptions will not lie to summary proceedings before justices of the peace; for it would introduce into them much delay and expence, which are the two evils meant to be avoided by the institution of summary proceedings. *Bur. Settle. Cas.* 77.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Of bills of exchange and promissory notes in general.*
2. *Statutes concerning bills of exchange and promissory notes.*
3. *Indorsement thereof.*
4. *Demand.*
5. *Acceptance.*
6. *Protest on non-acceptance.*
7. *Protest on non-payment after acceptance.*
8. *Remedy over against the drawer or indorser.*
9. *Case of bills lost or forged.*

1. *Of Bills of Exchange and Promissory Notes in general.*

A BILL OF EXCHANGE is a security, originally invented among merchants in different countries, for the more
 11 easy

easy remittance of money from the one to the other, which hath, since spread itself into almost all pecuniary transactions. 2 *Black.* 466.

It is an open letter of request from one man to another, desiring him to pay a sum named therein, to a third person on his account; by which means, a man, at the most distant part of the world, may have money remitted to him from any trading country. *Ibid.*

In common speech such a bill is called a *draught*, but a *bill of exchange* is the more legal as well as mercantile expression. *Ibid.*

The person however who writes the letter is called in law the *drawer*; and he to whom it is written, the *drawee*; and the third person, or negotiator, to whom it is payable, (whether specially named, or the *bearer* generally,) is called the *payee*. *Ibid.*

It is commonly drawn either payable at sight, or in so many days, weeks, or months, or at one or two *usances*; and the space of one month from the date of the bill is called *usance*, and two or three months double or treble *usance*.

These bills are either *foreign* or *inland*: *foreign*, when drawn by a merchant residing abroad upon his correspondent in *England*, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom. 2 *Black. ibid.*

Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 *W. c.* 17. the other 3 & 4 *An. c.* 9. (hereafter following) inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them. *Ibid.*

PROMISSORY NOTES, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified, at the time therein limited, to a person therein named, or sometimes to his *order*, or often to the *bearer* at large. These also, by the statute of the 3 & 4 *An. c.* 9. are made assignable and indorsible, in like manner as bills of exchange. But by 15 *G. 3. c.* 51. all promissory notes negotiable being for

any sum less than 20s. shall be void. And by 17 G. 3. c. 30. all such notes for 20s. or above, and under 5l. shall be also void, unless they specify the names and places of abode of the persons to whom made payable, and bear date at the time of drawing, and payable in twenty-one days after, and the indorsements thereon be made before the expiration of the said term.

2. *Statutes concerning Bills of Exchange and Promissory Notes.*

By the 9 & 10 W. c. 17. "Whereas great damages and other inconveniencies do frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on *inland bills of exchange* in this kingdom, it is enacted, that every bill of exchange drawn in or dated at and from any trading city or town, or any other place within this kingdom, upon any person in London, or any other trading city, town, or place (in which said bill shall be acknowledged and expressed the said value to be received), and drawn payable at a certain number of days, weeks, or months after date thereof, that from and after-presentation and acceptance of the said bill (which acceptance shall be by the under-writing the same under the party's hand so accepting), and after the expiration of three days after the said bill shall become due, the party to whom the bill is made payable, his servant, agent, or assigns, may cause the said bill to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two witnesses, refusal or neglect being first made of due payment of the same. S. 1.

"Which protest shall be made and written under a fair written copy of the bill, in the words or form following: *Know all men, that I A. B. on the — day of —, at the usual place of abode of the said —, have demanded payment of the bill of which the above is the copy, which the said — did not pay; wherefore I the said — do hereby protest the said bill. Dated at —, this — day of —.* S. 1.

"Which protest, so made, shall within fourteen days be sent, or otherwise due notice given thereof, to the party from whom the said bill was received; who is, on producing such protest, to repay the bill, together with all interest and charges from the day the bill was protested; for which protest shall be paid a sum not exceeding 6d. S. 2.

"And

“ And in default or neglect of such protest made and sent,
“ or due notice given, within the days before limited, the
“ person so failing or neglecting shall be liable to all costs, da-
“ mages, and interest, which shall accrue thereby. S. 2.”

And by the 3 & 4 An. c. 9. “ Whereas, by there being
“ no provision made in the foregoing act for protesting such
“ bills in case the party on whom they are drawn refuse to
“ accept the same, by underwriting the same under his hand,
“ all merchants and others refuse to underwrite such bills
“ or make any other than a promissory acceptance, whereby
“ the good intent of the said act is wholly evaded; it is
“ therefore enacted, that in case, upon presenting any such
“ bill of exchange, the party on whom the same shall be
“ drawn shall refuse to accept the same by underwriting it as
“ aforesaid, the party to whom it is made payable, his ser-
“ vant, agent, or assigns, may cause the bill to be protested
“ for *non-acceptance*, as in case of foreign bills of exchange:
“ for which protest shall be paid 2s. and no more. S. 4.

“ Provided, that no acceptance of any such inland bill
“ of exchange shall be sufficient to charge any person, unless
“ the same be underwritten or indorsed; nor shall the
“ drawer be liable to any costs, damages, or interest, unless
“ such protest be made for non-acceptance thereof, and
“ within fourteen days after be sent, or otherwise notice
“ thereof be given, to the party from whom such bill was
“ received, or left in writing at his usual place of abode:
“ And if such bill be accepted, and not paid before the ex-
“ piration of three days after the same shall become due;
“ then no drawer of such bill shall be liable to any costs, da-
“ mages, or interest, unless a protest be made and sent, or
“ notice given thereof as aforesaid. S. 5.

“ Provided, that no protest shall be necessary for non-
“ payment of any inland bill of exchange, unless the *value*
“ be acknowledged in the bill to be received, and unless
“ such bill be drawn for *twenty pounds* or upwards. S. 6.

“ And if any person accept any such bill of exchange in
“ satisfaction of any former debt or money due unto him,
“ it shall be deemed a full payment, if the person accepting
“ do not take his due course to obtain payment, by endea-
“ vouring to get the same accepted and paid, and make his
“ protest either for non-acceptance or non-payment. S. 7.

“ Provided, that nothing herein shall extend to discharge
“ any remedy that any person may have against the drawer,
“ acceptor, or indorser. S. 8.”

And

And by the same act of 3 & 4 An. c. 9. "PROMISSORY NOTES may be assigned or indorsed, and action maintained thereon, in every respect, as on inland bills of exchange. S. 1."

Note—By several acts of parliament, stamp duties are imposed upon bills of exchange and promissory notes, and upon *protests* and other *notarial acts*; for which and the exemptions, see *Burn's Justice*, title STAMPS.

3. *Indorsement thereof.*

THE person to whom either a bill of exchange or promissory note is made payable, hath clearly a property vested in him (not indeed in possession, but in action), by the *express* contract of the drawer in the case of a promissory note, and by his *implied* contract in the case of a bill of exchange, namely, that provided the person on whom the bill is drawn do not pay it, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer; in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose in action* is assignable: which assignment is the life of paper credit. 2 *Black.* 468.

The payee therefore, or person to whom or to whose order such bill of exchange or promissory note is payable, may, by indorsement or writing his name *in dorso*, or on the back of it, assign over his whole property to the *bearer*, or else to another person *by name*, either of whom is then called the *indorsee*; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to one or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it. *Ibid.*

4. *Demand.*

THE person to whom the bill is made payable, or to whom it is indorsed, (whether it be a general or particular indorsement,) is to go to the person on whom it is drawn, and offer his bill for acceptance. 2 *Black. ibid.*

For if, after the bill is payable, he makes no demand, so that he might have been paid if he had been diligent enough; then, if the party on whom the bill is drawn shall fail, it is at the peril of him who keeps the bill. *Mod. Caf.* 147.

5. *Accept-*

5. *Acceptance.*

THE acceptance, so as to charge the drawer with costs, must be in writing, under, or on the back, of the bill, as is required by the aforesaid statutes.

But a parol acceptance is sufficient to charge the acceptor for the *principal* sum, as it was before at common law. And there is a proviso in the act, that the same shall not extend to discharge any (other) remedy, that any person might have against the acceptor. *Str.* 1000.

Therefore after the drawee hath accepted the bill, either verbally or in writing, he thereby renders himself liable to pay it: for it is now a contract on his side, grounded on an acknowledgment that the drawer hath effects in his hands, or at least credit sufficient to warrant the payment. 2 *Black. ibid.*

6. *Protest on Non-Acceptance.*

IF the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, according to the statute aforesaid, the payee or indorsee may protest it for non-acceptance; which protest must be made in writing, under a copy of such bill, by some notary public, as aforesaid; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two witnesses; and notice of such protest must, within fourteen days after, be given to the drawer. 2 *Black. ibid.*

And the drawer, on producing such protest, is bound to make good to the payee or indorsee, not only the amount of the said bill (which he is bound to do, within a reasonable time after non-payment, without any protest, by the rules of the common law); but also interest and all charges, to be computed from the time of making such protest: But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. *Ibid.*

7. *Protest for Non-Payment after Acceptance.*

IF the bill be accepted by the person on whom it is drawn, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called *days of grace*), the payee or indorsee is then to get it protested for non-

non-payment, in the same manner, and by the same persons, who are to protest it in case of non-acceptance : and such protest must also be notified, within fourteen days after, to the drawer. And the drawer, on producing such protest, is bound to make good the same, in like manner as when the bill is protested for non-acceptance. 2 *Black. ibid.*

And in the said days of grace, no allowance is made for Sundays and holidays. 1 *Salk.* 128.

If the person, upon whom a bill is drawn, absconds before the day of payment, he to whom it is payable may protest it, in order to have better security for the payment, and to give notice to the drawer of the absconding : and after the time of payment is incurred, then it ought to be protested for non-payment, the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. *L. Raym.* 743.

8. *Remedy over against the Drawer or Indorser.*

If the bill be an indorsed bill, and the indorsee cannot get the person upon whom it is drawn to discharge it ; he may call upon either the drawer or indorser, or if the bill hath been negotiated through many hands, upon any of the indorsors : for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsors prior to his own, to each of whom he is properly an indorsee ; he also is at liberty to call upon any of them to make him satisfaction ; and so upwards. But the first indorser hath nobody to resort to, but the drawer only. 2 *Black. ibid.*

And what hath been said of bills of exchange, is applicable also to promissory notes that are indorsed over, and negotiated from one hand to another : only that, in this case, as there is no drawee, there can be no protest for non-acceptance ; or, rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsors. *Ibid.*

To intitle an indorsee of an inland bill of exchange to bring an action against the *indorser*, on failure of payment by the person upon whom the bill is drawn ; it is not necessary to make

make any demand of, or inquiry after, the first *drawer*. And the case is exactly the same upon *promissory notes*, when the resemblance between them is rightly understood. While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is *indorsed*, the resemblance begins. For then, it is an order by the *indorfor*, upon the maker of the note, (his debtor, by the note,) to pay to the *indorsee*. The *indorfor* is the drawer; the maker of the note is the acceptor; and the *indorsee* is the person to whom it is made payable. The *indorfor* only undertakes, in case the maker of the note doth not pay. The *indorsee* is bound to apply to the maker of the note. He takes it upon that condition, and therefore must, in all cases, know who he is, and where he lives; and, if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the *indorfor*.—*Bur. Mansf.* 676.

Therefore, before the *indorsee* of a promissory note brings an action against the *indorfor*, he must shew a demand or due diligence to get the money from the *maker* of the note; just as the person, to whom a bill of exchange is made payable, must shew a demand or due diligence to get the money from the *acceptor*, before he brings an action against the *drawer*; that is, in both cases, application must be made to the person from whom the money is supposed to be due. *Ibid.*

And therefore, in all cases, in actions upon inland bills of exchange, by an *indorsee* against an *indorfor*, the plaintiff must prove a demand of, or due diligence to get the money from the *drawee* or *acceptor*, but need not prove any demand on the *drawer*: And in actions upon promissory notes, by an *indorsee* against the *indorfor*, the plaintiff must prove a demand of, or due diligence to get the money from the maker of the note. *Bur. Mansf.* 678.

When a bill of exchange is *indorsed* by the person to whom it was made payable, as between the *indorfor* and *indorsee*, it is a new bill of exchange, and the *indorfor* stands in the place of the drawer. The *indorsee* doth not trust to the credit of the original drawer, he perhaps may not know whether such a person exists, or where he lives, or whether his name may have been forged. The *indorfor* is his drawer, and the person in whom he trusted if the *drawee* should not pay the money. And there is no difference, in this respect, between *foreign* and *inland* bills of exchange. *Id.* 674.

9. *Case*

9. *Case of Bills lost or forged.*

IN the aforesaid act of 9 & 10 W. c. 17. there is a proviso, that if any inland bill of exchange shall be *lost* or *mis-carried*, within the time limited for payment thereof, the drawer shall be obliged to give another bill of the same tenor: the person to whom it shall have been delivered, giving security (if demanded) to the drawer, to indemnify him against all persons whatsoever, in case the said bill so alleged to be lost or miscarried shall be found again.

If a *bank bill* be lost, an action of trover may be brought against the finder, because he hath no title; though payment to him would indemnify the bank: but if the finder transfers it over for a valuable consideration, an action shall not be brought against him to whom it is transferred, by reason of the course of trade, which creates a property in the assignee or bearer. 1 *Salk.* 126.

If the mail be *robbed* of a bank note, and afterwards the note is received in payment; the true owner is not intitled to recover it, against the person who came lawfully by it, for a valuable consideration, or in the common course of trade. *Burr. Mansf.* 452.

If a bill is accepted by the person upon whom it is drawn, and the money paid by him to an indorsee, and the bill afterwards appears to have been *forged*; the indorsee shall not pay back the money to the acceptor: for he should have inquired and satisfied himself whether the bill was genuine or not; or supposing no neglect to be in him, yet there is no reason to throw off the loss from one innocent man upon another innocent man. *Burr. Mansf.* 4357.

BILL OF SALE is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels. For if a man promises to give any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is *nudum pactum*, whereon arises no action. But if a man sells goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivering of possession, because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting.—But by statute 13 *Eliz. c. 5.* all conveyances of lands, goods, and chattels, to avoid the

debt or duty of another, shall, as against the party whose debt or duty is so endeavoured to be avoided, be utterly void; except grants made *bona fide*, and on good (which is construed a *valuable*) consideration.

If a man makes a bill of sale of all his goods, in consideration of blood and *natural affection* to his son, or one of his relations, it is a void conveyance in respect of creditors; for the consideration of blood and natural affection, which are made the motives to this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales.

If a man, being indebted to two persons, makes a secret conveyance to one of them of all his goods and chattels, in satisfaction of his debt; but notwithstanding continues in possession of them, and sells some of them, and sets his mark (as of sheep) on others of them, this is fraudulent, and shall not prevent the other creditor of his execution for his just debt. For though such sale hath one of the qualifications required for a good conveyance, being made to a creditor for a real debt, and consequently on a valuable consideration, yet it wants another essential consideration, for the owner's continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indiciu*m of the property of a chattel, and therefore this sale was not made *bona fide*.

And as the owner's continuing in possession is an undoubted badge of a fraudulent conveyance, so there are other marks and characters of fraud; as, a general conveyance of them all without any exception: for it is hardly to be presumed, that a man will strip himself intirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret agreement for a private occupancy of all or some part of the goods for his support: as also a secret manner of transacting such bill of sale, and unusual clauses in it, as that it is made honestly, truly, and *bona fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 Co. 80.

BIRTHS. By the 23 G. 3. c. 67. a stamp-duty is imposed upon the registering of every birth or christening. And by the 25 G. 3. c. 75. the same shall extend to all Protestant Dissenters.

BISAN.

BISANTIUM, *besant*, a coin first coined by the western emperors at *Bizantium* or *Constantinople*. It was of two sorts, gold and silver; both of which were current in *England*.

BISHOP, from the Saxon *biscop* (episcopus), signifies an overseer or superintendant; the bishop being so called, from that watchfulness, care, charge, and faithfulness, which by his place and dignity he hath and oweth to the church.

Bishops in this kingdom at first were elective by the clergy and people; but these popular elections being found to be inconvenient, they were afterwards appointed by the king, by delivery of a ring and pastoral staff, the *ring* as a token that the bishop was wedded to the church, and the *pastoral staff* as signifying that he was now become a shepherd of *Christ's* flock.

But the pope, who in process of time got himself advanced to be head of the church, disliked that the bishops should have any dependence upon princes, and therefore brought it about, that the canons in cathedral churches should have the election of their bishops; which elections were usually confirmed at *Rome*.

Afterwards, in the reign of king *Hen. 8.* they were made elective by the deans and chapters (without the pope) by the king's nomination. Which having in effect only the appearance of an election, in the reign of king *Ed. 6.* they were made donative by the king's letters patent without election: but afterwards, in the reign of queen *Mary*, this was again altered, and reduced to the standard of king *Hen. 8.* by election of the dean and chapter; which method still continues. In order whereunto, when a bishop dies or is translated, the dean and chapter certify the king thereof in chancery; upon which the king issues a licence to them to proceed to an election; which licence is called a *conge d'eslire*, which in *French* signifies *leave to elect*. And with the licence he sends a *letter missive*, containing the name of the person whom they shall elect; which if they shall refuse to do, they incur the penalty of a *præmunire*.

BISSEXTILE, leap year, so called because the *sixth* day before the calends of *March* (*viz. Feb. 24.*) is *twice* reckoned; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first contrived by *Julius Caesar*, to make the year agree better with the course of the sun.

BLACK ACT is an act of parliament made in the 9 G. 2. occasioned by the outrages committed by persons with their faces blacked or otherwise disguised, who appeared in *Epping* forest near *Waltham* in *Essex*, and destroyed the deer there, and committed divers other enormities; by which it is enacted, that if any persons armed with swords, fire arms, or other offensive weapons, and having their faces blacked or otherwise disguised, shall appear in any forest, chase, park, paddock, or ground inclosed where deer have been usually kept; or in any warren or place where hares or conies have been usually kept, or in any high road, open heath, common, or down; or shall hunt, wound, or kill any red or fallow deer; or rob any warren or place where hares or conies are usually kept; or shall steal any fish out of any river or pond; they shall be guilty of felony without benefit of clergy.

BLACK GAME. See **MOOR GAME.**

BLACK LEAD: Forcibly entering into any mine or wad hole of black cawke or black lead, or stealing any ore from thence, is by statute 25 G. 2. c. 10. made felony and transportation.

BLACKMAIL. *Maile*, in French, is a small piece of money, and in 9 Hen. 5. silver halfpence here were termed *mailes*. In a large acceptation, the word *maile* signifies a rent in general, paid either in money, corn, cattle, or other goods, as geese maile, cow maile, and the like; and in *Scotland*, maile is still the common word for rent. White maile, white rents, vulgarly called quit rents, were rents paid in silver, and thereby distinguished from work day rents, cummin rents, corn rents, and the like. Blackmaile, or black rents, seem properly to have been rents paid in cattle, otherwise called neat-geld; but more largely taken, it signifies all rents not paid in silver, by way of distinction from the *redditus albi*, blanck farms or white rents.—Extorting blackmaile in the northern counties, under pretence of protection against robbers and spoil takers, is by the 43 Eliz. c. 13. made felony without benefit of clergy.

BLANCK FARM was anciently a rent paid in silver, otherwise called *white rent*; in contradistinction from rent paid in cattle, corn, or the like. 2 Inst. 19.

BLANK

BLANK BAR is the same with what is called a common bar, and is the name of a plea in bar, which in an action of trespass is put in to oblige the plaintiff to assign the certain place where the trespass was committed. *Cro. Ja.* 594.

BLASPHEMY. See **PROPHANENESS.**

BLOOD CORRUPTED. See **CORRUPTION OF BLOOD.**

BLOODWITE, an amercement for bloodshed: a grant from bloodwite in ancient charters is an exemption from amercements of that kind.

BLOODY HAND, is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest. And it is where a trespasser is apprehended in the forest, with his *hands* or other parts bloody, though he be not found chasing or hunting the deer. *Manw.*

BOIS, *Fr.* wood; *Subbois*, underwood.

BONA FIDE, is that which is done with good *faith*, honestly, without any fraud or deceit.

BONA NOTABILIA. Where a person dies, having at the time of his death goods in any other diocese, besides his goods in the diocese where he dieth, amounting to the value of 5 *l.* in the whole, he is said to have *bona notabilia*; in which case, proof of his will, or granting administration, belongs to the archbishop of the province. *1 Roll's Abr.* 908.

But where by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered: as in the diocese of *London* it is 10 *l.* by composition. *4 Inst.* 335.

If a person happens to die, in another diocese than that wherein he lives, on a journey; what he has about him shall not be *bona notabilia*. *Savin.* 438.

Debts owing to the deceased are *bona notabilia*, as well as goods in possession; and they shall be *bona notabilia* in that diocese where the bonds or other specialties are, and not where the debtor inhabits. But bills of exchange, or other debts by simple contract, shall be *bona notabilia* in that place where the debtor is. *1 Roll's Abr.* 909.

Where a man dies possessed of *bona notabilia*, both in the province of *Canterbury*, and in the province of *York*, the will must be proved either before both metropolitans, if within each of their jurisdictions there be *bona notabilia* in divers dioceses; or else, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are. *Wentw.* 46.

1. A BOND, or obligation, is a deed whereby one doth bind himself, his heirs, executors, and administrators, to pay a certain sum of money, or do some other act; and there is generally a condition added, that if he doth perform such act, the obligation shall be void, or else remain in full force; as performance of covenants, standing to an award, payment of rent, or re-payment of a principal sum of money, with interest, which principal sum is usually half of the penal sum specified in the bond. 2 *Black.* 340.

He that enters into the obligation or bond is the *obligor*, he to whom it is made is the *obligee*.

2. If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or unintelligible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. 2 *Black.* 340.

3. If it be to do a thing that is *malum in se*, as to invade a man's private property, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. *Ibid.*

So a bond to a woman, as the price of her prostitution, is void; and she shall recover nothing. *Burr. Mansf.* 1568.

4. If the condition, in its own nature, is impossible, as if a man is bound in an obligation, with condition that if the obligor do go from *London* to *Rome* in three hours, that then the obligation shall be void; this condition is void and impossible, but the obligation standeth good. 1 *Inst.* 206.

5. But if the condition be possible at the time of making it, and afterward becomes impossible by the act of God, the act of law, or the act of the obligee himself; there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency. As if a man be bound with condition that he shall appear
the

the next term in such a court, and before the day the obligor dieth, the obligation is saved. 1 *Inst.* 206.

6. But it is commonly holden, that if the condition of a bond be against law, the bond itself is void. But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law that concerns not any thing that is *malum in se*; but therefore is against law because it is either repugnant to the tenor or against some maxim or rule of the law; and therefore in this case the condition is void, but the bond is absolute. 1 *Inst.* 206.

So if a man be bound, with a condition to make a deed of feoffment to his wife; the condition is void, because it is against a maxim in law: but the bond is good. 1 *Inst.* 206.

7. A voluntary bond, without consideration, if there be no fraud in obtaining it, is obligatory, and shall operate as a gift; but it shall not be paid in a course of administration, so as to take place of real debts, even by simple contract: yet it shall be paid before legacies. 1 *Cha. Ca.* 157. 1 *Atk.* 294.

8. If a bond has no date, or a false date, if it be sealed and delivered it is good; and shall bear date from the time of the delivery. 5 *Mod.* 282.

A bond dated on the same day on which a release is made of all things *until the day of the date*, is not thereby discharged: but otherwise it is, if *until the date*. 2 *Roll's Rep.* 255.

If the condition for payment of money be made impossible, as to make payment on the 30th of February; it shall be paid presently. *Wood, b. 2. c. 3.*

9. If the words in a bond, at the end of the condition, *then this obligation to be void*, are omitted, the condition will be void, but not the obligation: but if the words *or else shall stand in force* be left out, it has no effect to hurt either the condition or obligation.

10. If a man bind himself, his executors or administrators are bound though they be not named; but so it is not of the heir. 1 *Inst.* 209.

For an heir is not bound, unless he be named expressly in the bond. *Dyer*, 14. 271.

If a man binds (as is usual) himself, his heirs, executors, and administrators, after the death of the obligor, the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he hath real assets by descent as a recompence. 2 *Black.* 340.

In equity indeed, in favour of the heir at law, the personal estate is often directed to be applied first in discharge of

the bond; but at law there is no such distinction, but the creditor may proceed against the heir if he pleases, and he hath no remedy in a court of law. 2 *Atk.* 426.

11. If the condition is not performed, the bond becomes forfeited or absolute at law; but in such cases the courts of equity have relieved: and by the 4 *An. c.* 16. *f.* 13. in an action at law, on the defendant's bringing into court the principal, interest, and costs, he shall be discharged.

12. Where a bond is conditioned for payment of money, and no time is limited, in this case the money is to be paid presently, that is, in convenient time. 1 *Inst.* 208.

And yet there is a diversity between the condition of a bond, which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of writings, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to be done to the obligee is of its own nature local, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, or the like, if the obligee doth not hasten the same by request. 1 *Inst.* 208.

In case where the condition of the obligation is local, there is also a diversity, when the concurrence of the obligor and the obligee is requisite (as in the said case of a feoffment), and when the obligor may perform it in the absence of the obligee, as to acknowledge satisfaction in the court of king's bench, although the acknowledgment of satisfaction is local, yet because he may do it in the absence of the obligee, he must do it in convenient time, and hath not time during his life. *Id.*

But where the concurrence of both parties is requisite, and no place is mentioned for performance of the condition, the obligor is bound to find out the person of the obligee, if he be in *England*, and tender the money; otherwise the bond will be forfeited: but when a place is appointed, he need seek no further. 1 *Inst.* 210.

13. If several days are mentioned for payment of money upon a bond, the obligation is not forfeited, nor can be sued, until all the days are past. 1 *Inst.* 292.

14. In a bond where several are bound severally, the obligee is not at his election to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction only once; for if it be of one only, that shall discharge the rest. *Dyer*, 19. 310.

But he shall not sue several of them jointly, omitting the rest. As if three bind themselves jointly and severally, any one of them may be sued alone; but two of them cannot be sued, but either all or one. 1 *Roll's Abr.* 148.

A release to one obligor is a release to all, both in law and equity. 1 *Atk.* 294.

15. If a bond of 100*l.* be made with condition for the payment of 50*l.* at a day, and at the day the obligor tender the money, and the obligee refuses the same; yet in an action of debt upon the obligation, if the defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, and tender the same in court. 1 *Hyl.* 207.

16. After assignment of a bond, the money in equity is the assignee's; and payment to the obligor, after notice of the assignment, is not good. 2 *Vern.* 540.

17. It is said, that if a bond be of 20 years standing, and no demand be proved thereon, or good cause of so long forbearance shewed to the court, it shall be intended paid. 2 *Atk.* 144.

But in the case of *K. v. Stephens, M.* 31 G. 2. Lord Mansfield said, that there is no direct and express limitation of time when a bond shall be supposed to have been satisfied: the general time indeed is commonly taken to be about 20 years, but he had known lord *Raymond* leave it to a jury upon 18 years. *Burrow. Mansf.* 434.

The indorsement of interest being paid within 20 years, may be given in evidence, though under the hand of the obligee, the obligee being dead, and no circumstances appearing that the indorsement was fraudulently made to take away the presumption from length of time. *Str.* 826.

BOOK-LAND was so called because it was held by *deed* or *writing* under certain rents and services, and in effect differed in nothing from free socage land: and from hence have arisen all the freehold tenants which hold of particular manors, and owe suit and service to the same. It was so denominated in contradistinction to *folk-land*, which was held by no assurance in writing, but distributed among the common *folk* or people at the pleasure of the lord, and resumed at his discretion; and was no other than villenage. 2 *Black.* 90.

BOOKS. No person shall import for sale, or shall sell or expose to sale, any book first printed in this kingdom, and reprinted

reprinted elsewhere; on pain of forfeiting the same, and also 5 *l.* and double the value of every such book. 12 *G. 2. c. 36.*

In the case of *Millar and Taylor*, in the king's bench, *E. 9 G. 3.* it was determined, that an exclusive copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson and Becket*, before the house of lords, 22d *February 1774*, it was determined by the lords, that no copyright subsists in authors, after the expiration of the several terms created by the statute 8 *An. c. 19.* which enacts, that the author of any book, and his assigns, shall have the sole liberty of printing and re-printing the same for fourteen years, to commence from the day of the first publication thereof, and no longer; except that if the author be living at the expiration of the said term, the sole copyright shall return to him for other fourteen years: and if any other person shall print or import, or shall sell or expose to sale any such book without the consent of the proprietor, he shall forfeit the same, and also one penny for every sheet thereof which shall be found in his possession.—But this shall not expose any person to the said forfeitures, unless the title thereof before publication be entered in the register book of the Company of Stationers.

And nine copies of each book, on the best paper, shall, before publication, be delivered to the warchouse-keeper of the Company of Stationers, for the use of the Royal Library, the libraries of the two Universities in *England*, the four universities in *Scotland*, the library of *Sion college*, and of the faculty of advocates at *Edinburgh*; on pain of forfeiting the value thereof, and also 5 *l.*

BORD-HALFPENNY, a small toll, by custom paid to the lord of the town for setting up *boards*, tables, or booths, in a fair or market.

BORGH-BRECHE, a breach of the peace within the borgh or pledge, for the preservation of which peace the members of the decennary or frank pledge were sureties for each other. Upon breach of the peace, their bond or assurance was forfeited: from which forfeiture several ancient charters granted, to particular persons or bodies corporate, an immunity to be free from *borgh-breche*.

BOROUGH (*burg*, Saxon) signified originally a walled town or other fortified place, perhaps from the Greek word

πύργος.

πυργος. But now it is used to denote any town corporate which is not a city.

BOROUGH ENGLISH; so named in contradistinction as it were to the *Norman* customs, is a custom in divers ancient boroughs, of the youngest son succeeding to the bur-gage tenement on the death of his father. 2 *Black.* 83.

BOROUGH-HOLDERS. See **BORSHOLDER.**

BORROWING, or *hiring*, are contracts, the same in law whereby the possession and a transient property is transferred for a particular time or use, and to be returned as soon as the time is expired, or the use performed. If a thing lent for use, be used to any other end or purpose than that for which it was borrowed, the party may bring his action for it, though it be no worse: and if what is borrowed be lost, although not by any negligence of the borrower, as if he be robbed of it, or where the thing is impaired or destroyed by his neglect, admitting it to be put to no more service than that for which borrowed, he must make it good; so where I borrow a horse and put him in an old rotten house likely to fall, and it does fall and kills him, I must answer for the horse; but if the goods borrowed perish by the act of God in the right use of them; as where I put the horse in a strong house, and it fall and kill him, or he dies by disease, or by default of the owner, I shall not be chargeable. *Co. Lit.* 89. 2 *Black.* 453.

BORSHOLDER contains within it the meaning of tithing-man, borowhead, headborow, third-borow, and chief pledge; and is made up of the *Saxon* *borge*, *borrow*, or *borhoe*, a pledge, and *calder*, the elder, chief, or head; and *borsholder* in one word is the chief or head of the sureties or pledges. For after the kingdom was divided into hundreds, and those hundreds again into tithings, consisting each of ten men with their families, each of whom was to be surety or pledge for the other, those ten men chose one of their number to speak and to do in the name of them all, he was therefore in some places called the tithing-man, in other places the *boroes elder* (whom we now call *borsholder*), in other places the *borohead* or *headborrow*, and in other places the chief pledge. *Lamb. Cons.*

BOSCAGE

BOSCAGE is that food which wood and trees yield to cattle, as of leaves and croppings; and herein differs from *pannage*, which consists of the fruit of such trees, as acorns, crabs, or mast. It seems also to have signified a duty paid for the privilege of dead or windfall wood in the forest; and a grant to be quit of *boscage* is, to be discharged from the payment of such duty.

BOSARIA, wood houses, sheds (or shades) for cattle.

BOTE, *Sax.* signifies a recompence, satisfaction, or amends, or from *baten*, *Dutch*, profit or advantage. Hence came the old word *manbote*, denoting a compensation for a man slain. There are also *house-bote*, *cart-bote*, *hedge-bote*, *plough-bote*, signifying privileges of tenants in cutting wood for those uses: and these the tenant or lessee may take from off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. 2 *Black.* 35.

BOTELESS, or *bootless*, without recompence, reward, or satisfaction made, or useless, unprofitable, or without success.

BOTTOMRY is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship as a security for repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent.—But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage; then only the borrower, personally, is bound to answer the contract; who, therefore, in this case is said to take up money at *respondentia* (for which himself only is responsible). 2 *Black.* 453.

BOVATA

BOVATA TERRÆ, an oxgang, being as much land as one yoke of oxen can plough in a year.

BOUCHE OF COURT (from *bouche*, a mouth) was a certain allowance of provision from the king, to his knights and servants that attended him in any military expedition.

BOWBEARER, an under officer of the forest, whose office it is to oversee and make inquiry of all trespasses done either to the vert or venison.

BRACETUS, *Fr. brachet*, a hound, chiefly of the larger kind; as *bracelet* was of a smaller kind, a *beagle*. So *bracenarius* was the huntsman or master of the hounds.

BRASIUM, *malt*. So *braciator* (from the *Fr. brasseur*) is a maltster or malt-maker. But in some of the ancient statutes, *braciator* is taken for a brewer; and *braciatrix* was the woman who sold ale, against whom, if she offended against the assise of ale, the punishment of the tumbrel was ordained by the statute 51 *H. 3. c. 6*. In some manors the tenants were bound by their tenure to dry the lord's malt at his kiln, on his finding them wood for that purpose.

BREACH signifies where a person commits any breach of the condition of a bond, or of his covenant entered into; in which case, upon an action brought, the plaintiff must assign the breach, otherwise he will have no cause of action. 1 *Saund.* 102. And when a breach is assigned, it must not be general, but must be particular; as in an action of covenant for not repairing of houses, the breach ought to be assigned particularly, what is the want of reparation. But on mutual promise, for one to do an act, and in consideration thereof another to do some act, as to sell goods for so much money, a general breach that the defendant hath not performed his part is well assigned. 3 *Lev.* 319.

In case of a bond for performance of an award, if the defendant pleads any matter by which he admits a non-performance, and excuses it; the plaintiff in his replication must shew the award, and assign the breach, that the court may see an award was made, and judge whether it was good or not; for if it should be of a void part thereof, it need not be performed. 1 *Salk.* 138.

Where

Where a thing is to be done by a person or his assigns, the breach must be alleged that it was done neither by the one nor the other. 5 *Mod.* 133.

If several breaches are assigned, and the defendant demurs upon the whole declaration; the plaintiff shall have judgment for all that are well assigned, for they are as several actions. *Cro. Ja.* 557.

In actions on bonds, or any penal sum for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury may assess damages for such of the breaches as the plaintiff upon the trial shall prove to have been broken. 8 & 9 *W. c.* 11.

BREDWITE, a fine or penalty imposed for defaults in the assize of bread.

BREHON law, in *Ireland*, was so called from the *Irish* name of judges, who were denominated *brehons*. At the time of the conquest of *Ireland* by king *Henry the Second*, the *Irish* were governed by this law. But by several kings of *England*, successively, this law was enjoined to be abolished, and the laws of *England* to be received in the place of it. But many of the *Irish* still adhered to their *brehon* law; and so late as the reign of queen *Elizabeth*, the wild natives still kept and preserved this their ancient law, which is described to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity in determining the right between party and party, but in many things repugnant both to God's law and man's law." *Spencer's State of Ireland*, 1513. 1 *Black.* 100.

BREVE is any writ by which a person is summoned or attached to answer an action, or whereby any thing is commanded to be done in the king's courts. It is called *breve*, for the brevity of it; and is directed to the sheriff or other officer.

BRIBERY, in a strict sense, is taken for a great misprision of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who hath to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the

the common law, by fine and imprisonment. 1 *Haw.* 168.

BRICKS and TILES. By 7 G. 3. c. 42. 24 G. 3. c. 24. & 25 G. 3. c. 66. several regulations are made concerning the true making of bricks and tiles. And by the 27 G. 3. c. 13. a duty is laid upon all bricks and tiles made in *Great-Britain*, which are to be under the management of the officers of excise.

BRIDGES. Every parish, by the ancient common law, was bound to the repair of the public bridges therein. From this burden no man was exempt, whatever other immunities he might enjoy, this being part of the *trinoda necessitas*, to which every man's estate was subject, viz. castles, bridges, and expeditions. 1 *Black.* 357.

But now the statute of 22 *Hen.* 8. c. 5. hath laid this charge upon the county.

None can be compelled to make new bridges, where never any were before, but by act of parliament. 2 *Inst.* 701. But if a man builds a bridge, which afterwards becomes of public use, the county is obliged to repair it. *Bur. Mansf.* 2594.

Any inhabitant may be made defendant to an indictment for not repairing a bridge, and be liable to pay the whole fine for default of repairs, and shall be put to his remedy for a contribution; for bridges being of absolute necessity, are not to lie unrepaired till suits shall be determined. 1 *Haw.* 221.

BRIEF, *brevis*, an abridgment of the client's case made use of for instruction of counsel on trial at law, wherein the case of the party is to be briefly but fully stated.

BRIEF for collecting charity.—The undertaker of the briefs shall cause all the copies thereof to be marked with the name of one trustee (or more) written with his own hand, with the time of signing; and shall also cause them to be stamped with a stamp kept for that purpose by the register of the court of chancery. Then he shall deliver them to the churchwardens, chapelwardens, teachers and preachers of every separate congregation, who shall indorse the time of receipt, and set their names. And they again shall deliver them to the ministers, who also shall indorse and sign the

the same in like manner. And the briefs shall be publicly read within two months after receipt ; and the sum collected shall be indorsed in words at length, and signed by the minister and churchwardens, or by the teacher and two elders. Which sums they shall, within six months after the time of the delivery of the briefs, pay over to the undertaker, taking his receipt for the same in a book to be kept for that purpose. And any person making default in the premises shall forfeit 20*l*. And a register shall be kept by the minister of all monies collected, when, and on what occasion. And the undertaker, in two months, shall account before a master in chancery.—If any person shall purchase or farm charity money on briefs, he shall forfeit 500*l*. to the use of the sufferers. 4 *An. c.* 14.

BRIGANDINE, a coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body.

BRIGBOTE, a fine or amercement for not repairing of bridges. A grant of freedom from *brigbote*, is to be free from the payment of such fine.

BROCAGE, the wage or hire of a *broker*.

BROCHA (Fr. *broche*) a *broach* or spindle not yet out of use. The tapering spire of a steeple is in some places called a *broach*. A *spit*, in some parts of *England*, is called a *broach*. And hence comes the expression of piercing or *broaching* a barrel.

BROKERS (*broccatores, broccarii*) are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward.

The statute 1 *Ja. c.* 21. recites, that, of ancient standing, there have been brokers within the city of *London*, being freemen of the said city, appointed by the lord mayor and aldermen, and sworn by them to demean themselves uprightly between merchants and tradesmen, in making bargains and contracts. And by 8 & 9 *W. c.* 20. they are to carry about them a silver medal, having the king's arms and the arms of the city, and pay 40*s.* yearly to the chamber of the city. By 7 *G. 2. c.* 8. contracts for transferring stock, whereof

whereof the party contracting to transfer the same shall not be then in actual possession, shall be void; and the person offending herein shall forfeit 100*l.*; and if any broker shall negotiate such contract, he also shall forfeit 100*l.*

There are, besides these, certain persons called *pawn-brokers*, who commonly keep shops, and let out money to poor necessitous people upon pawns: but these are not of that antiquity or credit as the former; nor do the statutes allow them to be brokers, though now commonly so called. Several late statutes have made divers regulations in their trade, and subjected them to annual licences and divers penalties on trading without such licences, as contrary to the directions of the statutes; for which see 30 G. 2. c. 24. 25 G. 3. c. 48. and 29 G. 3. c. 57. or *Burn's J.* title PAWNING.

BROTHEL HOUSES are lewd places, being the common habitations of prostitutes. They were formerly allowed in certain places, and especially on the Bank Side, in *Southwark*, where they had signs before their doors in like manner as inns and ale-houses. By the statute 14 Ric. 2. it was enacted, that no estews or brothel houses should be kept in *Southwark*, but in the common places therefore appointed. Of these, before the reign of king *Henry* the seventh, there were eighteen allowed; but that king for a long time forbade them. Afterwards twelve, and no more, were permitted. But finally, king *Henry* the eighth, by proclamation, in the 37th year of his reign, suppressed them all. And so odious were they become, that men in making leases of their houses did add an express condition, that the lessees should not suffer, harbour, or keep any lewd women within the said houses. 3 *Inst.* 205, 6.

BRUERE, *brueria* (Sax. *brær*, briar), heath ground, or uncultivated, over-run with brambles or brush-wood.

BUCKSTALL, a *station* to watch the deer in hunting; the attending whereof was a service performed by the tenants to the lord within the forest.

BUGGERY (from the Italian *bugarone*, this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, among christians not to be named, committed by carnal knowledge

against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by woman-kind with brute beast. 3 *Inst.* 58.

By statute 25 *H. 8. c. 6.* this offence is made felony without benefit of clergy.

If the party buggered be within the age of discretion (which is generally reckoned the age of fourteen) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 *Inst.* 59.

BUILDING erected so near a man's house, that it stops up his lights, is not a nuisance for which an action will lie, unless the house is an ancient house, and the lights ancient lights. 2 *Salk.* 459.

But if the house new built exceeds the ancient foundation, and thereby is the cause of hindering the lights of another house, an action lies against him who caused it to be erected. *Hob.* 131.

BULL, *bull*, was a brief or mandate of the pope or bishop of *Rome*, so called from the seal of lead, or sometimes of gold, affixed to it. To procure, publish, or put in use any of these, is by act of parliament made high treason.

BULL AND BOAR: By custom, in some parishes, the parson is obliged to keep a bull and boar, for the common use of the parishioners, for the increase of calves and pigs; in which case, every inhabitant prejudiced by his not keeping the same may have an action on the case against him. *Cro. Eliz.* 469.

BULTEL is the coarser part of flour when dressed by the baker. The word is mentioned in the statute of the assize of bread and beer, 51 *Hen.* 3. Hence comes *bulted* or *boulted* bread.

BURG, perhaps from the Greek *πυργος*, a tower, signified in ancient times a walled town, or other fortified place.

BURGAGE, a dwelling-house within a borough town.

BURGAGE TENURE is, where houses, or lands which were formerly the site of houses, in an ancient borough,
are

are held of the king or some other lord in common socage, by a certain established rent. 2 *Black.* 82.

Many of such boroughs have divers customs and usages, which are not had in other places. For some boroughs have a custom, that if a man hath issue many sons, and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir to his father, by force of the custom; which custom is called *Borough English*. Also in some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's. *Litt.* 165, 6.

These ancient boroughs seem to have withstood the shock of the Norman incroachments, principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure, as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment as the tenure in chivalry was. 2 *Black.* 82.

BURG-BOTE, a compensation, boot, or contribution, for the building and repairing of castles or walls of a borough or city: from which service divers persons or bodies politic had exemptions by grant from our ancient kings, that they should be free from *burg-bote*.

BURG-BRECHE, a fine imposed on the community of a town, for breach of the peace. See **BORG BRECHE**.

BURGESSES, *burgenses*, in general, are the inhabitants of a borough town. Sometimes the word is restricted to the magistrates or other principal inhabitants. And sometimes to the representatives of such borough in parliament.

BURGLARY (from the Saxon *burgh*, a house, and *larron*, a thief, probably from the Latin, *latro*, *latronis*) is a felony at common law, in breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether the felonious intention be executed or not. *Hale's Pl. C.* 79.

The mansion-house includes not only the dwelling-house, but also the outhouses that are parcel thereof; as barn, stable,

cow-house, dairy-house, if they are parcel of the messuage, though they be not under the same roof, or joining contiguous to it: but if it be remote from the dwelling-house, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking is not burglary. 1 *H. H.* 558.

If a person shall enter without breaking the house, with intent to commit felony, or being in the house, shall commit any felony, and shall in the night-time break the house to get out, he shall be guilty of burglary. 12 *An. c.* 7.

If a window of the house be open, and a thief with a hook or engine draweth out some of the goods of the owner, this is no burglary, because there is not an actual breaking. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64.

And as there must be a breaking, so there must be an actual entry; but it is sufficient if the thief breaks the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house, or if he put a gun into the window which he hath broken with intent to murder or kill: but if he doth barely break the house without any such entry at all, this is no burglary. *Id.*

If divers come in the night to commit a burglary, and one of them breaks and enters, the rest of them standing to watch at a distance, this is burglary in them all. *Id.*

Every person, who shall apprehend and prosecute to conviction any person guilty of burglary, shall have a certificate from the judge, which shall exempt him from all parish and ward offices within the parish and ward where the felony was committed; which certificate may be assigned once over. 10 & 11 *W. c.* 23. And moreover such person, as a further reward, shall be intitled to the sum of 40*l.* And if any person, being out of prison, shall commit any burglary, and afterwards discover two or more accomplices, so as they be convicted; he shall have a pardon, and the like sum of 40*l.* 5 *An. c.* 31.

BURGH-MOTE, a borough court.

BURIAL: By the custom of *England*, any person may be buried in the churchyard of the parish where he dies,
without

without paying any thing for breaking the foil. *Degge. P. 1. c. 12.*

For the encouragement of the woollen manufacture, no corpse of any person shall be buried in any shroud or other thing, but what is made of sheep's wool only. 30 *G. 2. ft. 1. c. 3.*

Necessary funeral expences are allowed, previous to all other debts and charges. But if an executor or administrator be extravagant, it is a devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black. 508.*

A person who voluntarily kills himself is denied christian burial; and to shew the abhorrence in which this crime is holden in the eye of the law, he shall be buried ignominiously in the highway, with a stake driven through his body. 4 *Black. 190.* And by the 23 *G. 3. c. 67.* a stamp duty is imposed upon all burials.

BURNING the house of another wilfully and maliciously, by night or by day, is felony at the common law. And by particular statutes divers kinds of burning are made felony, and others have other penalties annexed to them. By 37 *H. 8. c. 6.* burning any wain or cart, laden with coals or other goods, or any heap of wood prepared for making coals or billets, is subject to treble damages, and a fine of 10*l.* By 43 *El. c. 13.* for preventing rapine on the northern borders, to burn any barn or stack of corn, or grain, is felony without benefit of clergy. By 22 & 23 *C. 2. c. 7.* burning in the night-time any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns, is felony; but the offender may make his election to be transported for seven years. By 5 *W. c. 23.* to burn on any waste, between *Candlemas* and *Michaelmas*, any grig, ling, heath, goss, or fern, is punishable with whipping and confinement in the house of correction. By 1 *An. ft. 2. c. 9.* captains and mariners belonging to ships, burning or destroying the same, are guilty of felony without benefit of clergy. By 6 *An. c. 31.* servants negligently firing houses shall forfeit 100*l.*; and if not able to pay, shall be imprisoned in the house of correction eighteen months. By 1 *G. ft. 2. c. 48.* & 6 *G. c. 16.* setting on fire any wood, springs of wood, or coppice, is felony (but within clergy). By 9 *G. c. 22.* setting fire to any house, barn, or outhouse, or to an hovel, cock, mow,

or stack of corn, straw, hay, or wood, is felony without benefit of clergy; and the hundred shall answer damages, By 10 G. 2. c. 32. the like penalty for setting fire to any mine, pit, or delph of coal or cannel coal. By 28 G. 2. c. 19. setting fire to any goss, furze, or fern, in any forest or chase, is subject to a penalty of 5*l*. By 9 G. 3. c. 29. burning or setting fire to any kind of mill, is felony without benefit of clergy: and burning or setting fire to any machine or engine belonging to any mine, is felony and transportation for seven years. By 12 G. 3. c. 24. burning or setting fire to any of his majesty's ships of war, or any arsenal, magazine, dock yard, rope yard, victualling office, or any military or naval stores or ammunition, is felony without benefit of clergy.

BUTLERAGE is an ancient hereditary duty belonging to the crown, much older than the customs; which was a right of taking two tons of wine from every ship importing into *England* twenty tons or more; which by king *Edward* the first was exchanged into a duty of 2*s*. for every ton imported by merchant strangers, and called *butlerage*, because paid to the king's butler. 1 *Black.* 314.

BUTTS, the place where archers meet with their bows and arrows to shoot at a mark, which is called shooting at the *butts*.

BUYING OF TITLES. At the common law, it is an high offence to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the feller is not able, or doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate; and it seems not to be material whether the title so sold be good or bad, or whether the feller were in possession or not, unless his possession was lawful and uncontested. 1 *Harv.* 261. And by statute 32 H. 8. c. 9. none shall buy any pretended right in any land, unless the feller hath been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one year next before; on pain that the feller shall forfeit the land, and the buyer the value thereof.

BY-LAWS are orders made *by the bye*, in particular cases whereunto the public law doth not extend. In *Scotland*, these laws

laws are called laws of *birlaw*, which are made by neighbours elected by common consent in the *birlaw* courts, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled *birlaw-men*.

Every corporation lawfully erected hath power to make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void.

1 *Black.* 475.

The inhabitants of a town may make by-laws for the reparation of the church, highway, or any thing which is for the general good of the public, without alleging a custom; for they are for such like purposes incorporated as it were by the common law: and the greater part of the inhabitants shall bind the rest. But if the by-law is for their own private profit, as for the well ordering of the common, or the like; there, without custom, they cannot make by-laws.

5 *Co.* 63.

So the freeholders in a leet may make by-laws relating to the public good, for matters within the leet; and they shall bind every one if they are for the public good: otherwise, if they are for a private interest, they bind those only that agree to them. *Wood, b. 4. c. 1.*

Also, a court baron may make by-laws by custom, and add a penalty upon the breach thereof, which cannot be affeered, for a penalty differs from an amercement. *Id.*

A corporation by charter cannot make by-laws inconsistent with the intention of their charter. *Bur. Mansf.* 2207.

A by-law in restraint of trade is not good, without setting forth a particular custom to support it. *Id.* 17.

A forfeiture imposed by the by-laws and private ordinances of a corporation, upon any that belong to the body, creates a debt in the eye of the law; and, if unpaid, may be recovered by action of debt. 3 *Black.* 159.

C A L

CALLING the plaintiff is, where, upon the trial, the plaintiff perceives that he has not given evidence sufficient to maintain his issue, he thereupon withdraws himself,

K 4

or

or becomes voluntarily nonsuited. Whereupon the crier is ordered to *call* the plaintiff, and if he appears not, the action is at an end, and the defendant shall recover his costs. And the reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit he may commence the same suit again for the same cause of action; but after a verdict and judgment thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. 3 *Black.* 376.

CANDLES. By the 24 G. 3. c. 41. every maker of candles for sale, and also every person trading in, or selling candles, shall take out a licence annually from the officers of excise. But no person licensed as a maker of candles, need be licensed as a seller also.

But by the 25 G. 3. c. 74. no person residing within the limits of the head office in *London*, shall be permitted to make candles, unless he occupy a tenement of 10 *l.* a year, for which he shall be assessed in his own name; and shall also pay to the parish rates elsewhere, unless he be assessed, and pay to church and poor.

And by the 27 G. 3. c. 13. a duty is imposed on all candles made in *Great Britain*, and drawbacks allowed on the exportation thereof, as specified in a schedule annexed to the act.

And by the above statutes, and also by several others, regulations are made for the making of candles, which are to be under the inspection of the officers of excise.

CANONS, from *κανον*, *regula*, were originally an order of religious persons that lived under certain *rules* which they prescribed to themselves, and were divided into two sorts, *secular* and *regular*. The secular were so called, because they conversed *in seculo*, abroad in the world, and performed spiritual offices to the laity, in the same manner as the canons and prebendaries in cathedral and collegiate churches at this day. *Regular* canons were such as lived together under one roof, and were obliged to observe the rules of their order.

CANON LAW is a body of *Roman* ecclesiastical constitutions made from time to time for the regulation of matters relating to the church; and compiled chiefly from the writings of the holy fathers, the decrees of general councils,

cils, and the decretal epistles and bulles of the pope. More particularly, of the canon law, there are two principal parts, the *Decrees*, and the *Decretals*.

The *Decrees* are ecclesiastical constitutions, made by the pope and cardinals, at no man's suit. These were first collected by *Ivo*, in the year 1114; and afterwards polished and perfected by *Gratian*, a monk of *Bononia*, in the year 1149.

The *Decretals* are canonical epistles written by the popes alone, or by the popes and cardinals, at the instance or suit of some one or more, for the ordering and determining of some matter in controversy. Of these there are three volumes: The first, collected by order of *Gregory* the ninth, about the year 1231. The second, by *Boniface* the eighth, about the year 1298. The third, made by pope *Clement* the fifth, and from him called the *Clementines*, and published by him about the year 1308.

To these may be added the *Extravagants* of pope *John* the twenty-second, and of some of his successors.

And besides this foreign canon law, we have in this kingdom our *legatine* and *provincial* constitutions.

The *legatine* constitutions were enacted in *national* synods held under the cardinals *Otho* and *Othobon*, legates from pope *Gregory* the ninth and pope *Clement* the fourth, in the reign of king *Henry* the third, about the year 1220 and 1268.

The *provincial* constitutions are principally the decrees of provincial synods held under divers archbishops of *Canterbury*, from *Stephen Langton*, in the reign of king *Hen.* 3. to *Henry Chicheley*, in the reign of king *Hen.* 5. and adopted also by the province of *York*, in the reign of *Hen.* 6.

At the dawn of the reformation, in the reign of *Hen.* 8. it was enacted in parliament, that a review should be made of the canon law; and, till such review should be had, the said canon law, being then already made, and not repugnant to the law of the land or the king's prerogative, should be still used and executed. And as no such review hath yet been perfected, upon this statute depends the authority of the canon law in *England*.

The canons made by the clergy in 1603, in the reign of *James* the first, not having been confirmed in parliament, are not allowed to be in force so as to bind the laity, further than they are declaratory of the ancient canon law.

CAPE is a writ judicial, touching plea of lands or tenements; so termed, as most writs are, of that word in it, which carries the chief intention or end thereof. And this writ is divided into *Cape Magnum* and *Cape Parvum*, both of which take hold of things immoveable. *Cape Magnum*, or the *Grand Cape*, is a writ that lies before appearance, to summon the tenant to answer the default, and also to answer over to the demandant: and this is, where a man hath brought a *Præcipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king, to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land. *Cape Parvum*, or *Petit Cape*, is, where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default, then shall issue this writ for the king. The difference between the *Grand Cape* and *Petit Cape* is, that the *Grand Cape* is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ doth not mention the particular demanded: and the *Petit Cape* is after appearance or view granted. And whereas the *Grand Cape* summons the tenant to answer for the default, and likewise over to the demandant; *Petit Cape* summons the tenant to answer the default only. *Registers*, 1, 2.

CAPIAS AD AUDIENDUM. In case of a misdemeanor, after the defendant hath appeared and is found guilty, and is not present in court upon his conviction, a *Capias* is awarded *ad audiendum judicium*, that is, to bring him in to receive judgment; and if he absconds, he may be prosecuted even to outlawry. 4 *Black*. 368.

A CAPIAS PRO FINE is, where one who is fined to the king for some offence committed against a statute, doth not discharge the fine according to the judgment: whereupon his body is to be taken by this writ, and committed to prison until he pay the fine.

It is also used in some civil actions; but by 5 *W. & M.* c. 12. *capiaturs fines* are taken away in several cases.

A **CAPIAS AD RESPONDENDUM** is a writ, commanding the sheriff to take the body of the defendant, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt, or trespass, or the like, as the case may be. 3 *Black.* 282.

And if the sheriff returns that he cannot be found, then there issues another writ called an *Alias capias*; and, after that, another called a *Pluries capias*; and if, upon none of these he can be found, then he may be proceeded against unto outlawry. *Id.*

But all this being only to compel an appearance, after the defendant hath appeared, the effect of these writs is taken off, and the defendant shall be put to answer; unless it is in cases where special bail is required, and there the defendant is actually to be taken into custody. *Id.*

CAPIAS AD SATISFACIENDUM is a writ directed to the sheriff, commanding him to take the body of the defendant, to make the plaintiff satisfaction for his demand; otherwise he is to remain in custody till he does. 3 *Black.* 415.

This is a writ of the highest nature, as it deprives a man of his liberty, till he makes the satisfaction awarded: and, therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. *Id.*

But if the defendant dies, whilst he is charged in execution upon this writ, the plaintiff may, after his death, sue out new executions against his lands, goods, or chattels. 3 *Black.* 415.

A **CAPIAS UTLAGATUM** is a writ that lies against a person that is outlawed in any action, whereby the sheriff is commanded to apprehend the party outlawed, and keep him in safe custody till the day of the return of the writ, and then have his body there to be ordered for his contempt. But this being only for want of appearance, if he shall afterwards appear, the outlawry most commonly is reversed. 3 *Black.* 284.

If a person is outlawed on a criminal prosecution, any one may take him, either by a writ of *Capias Utlagatum*, or without: if it is for treason or felony, the outlawry, in strictness, is a conviction of the offender; but in such cases the outlawry is frequently reversed, and the party admitted to plead

plead and defend himself against the indictment. 4 *Black*, 315.

A **CAPIAS IN WITHERNAM** (from *wyther*, in Saxon *ether*; and *naam*, a taking or distress;) is a writ directed to the sheriff, in case where a distress is carried out of the county or concealed by the distrainer, so that the sheriff cannot make deliverance of the goods upon a replevin; commanding him to take so many of the distrainer's own goods by way of reprisal, instead of the other that are so concealed. 2 *Inst.* 140, 1. *F. N. B.* 68, 69. 13 *Ed.* 1. c. 2.

CAPITE. Tenants *in capite*, or in chief, were those that held of the king as the *head* or fountain of tenure. And it might be either by knights service, or in socage. But now tenure *in capite* is abolished by the 12 C. 2. c. 24. and turned into free and common socage.

CAPTION (from *capio*, to take) signifies a *taking* in general. Caption of an indictment is the preamble to the indictment, setting forth when, and before what court, the indictment was *taken*. So upon the execution of any commission, as of taking fines of lands, taking answers in chancery, or depositions of witnesses; the captors, or persons who executed the commission, specify, in their return, the time and place of the *taking* thereof.

CAPTIVE is a prisoner taken in war, in whom the taker has a sort of qualified property, at least until his ransom be paid. In the borders of *England* and *Scotland*, before the union, the skirmishing parties in both kingdoms made incursions upon each other, not with an intention of slaughter, but of taking prisoners, who were to continue with the taker till payment of the ransom agreed on. There is a writ in the Register for breaking the plaintiff's house, and setting at large one B. a Scotchman, whom the plaintiff had taken in war as his prisoner, and detained until he should pay to the plaintiff 100*l.* being the price agreed on for his redemption and saving of his life. 2 *Black.* 402.

CAPTURE signifies properly the goods, and ships, or vessels, of an enemy taken at sea in time of war. These belonged originally to the captor. And anciently it was holden, that if an enemy take the goods of an Englishman, which
are

are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein as soon as the goods have been the property of the captor for the space of twenty-four hours; but the more modern authorities require, that before the property can be changed, the goods must have been brought into port, and have continued one night (*intra præsidia*) in a place of safe custody, so that all hope of recovering them was lost. 2 *Black.* 401.

CARDS. By several acts of parliament a duty is imposed on every pack of playing-cards. See *Burn's* *J.* tit. **CARDS** and **DICE**.

CARRIER is one that carries goods for others for hire; under which denomination are included masters and owners of ships, lightermen, stage coachmen, and all others who undertake the carriage of goods for a reward.

2. By statute 3 *W. c.* 12. the justices of peace have power to rate the prices of all land carriage of goods to be brought into any place within their jurisdiction. And by 21 *G. 2. c.* 28. the same prices were to be paid for the carriage of goods to *London*, as the justices had fixed for the carriage from *London*. But this latter act is repealed by 7 *G. 3. c.* 40. & 13 *G. 3. c.* 84.

A carrier shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 *Bac. Abr.* 334.

3. A person, to whom goods are delivered to be kept, is only obliged to keep them as he would keep his own; but a common carrier, in respect of the reward, must make good the loss, although he himself may not be in fault. *Bur. Mansf.* 2298.

And the reward ought to bear proportion to the risque: therefore he ought to have more for carrying money or jewels than for common ordinary goods. *Id.*

4. For he may refuse to contract in extraordinary cases, without extraordinary terms. He may accept specially. He shall be answerable for no more than he is told of, and not for what is concealed from him, and whereby he is deceived. And therefore, if money or jewels are sent by him, and it be denied

denied or concealed that it is money or jewels, he is not answerable for the loss of them. *Id.*

5. Where goods are delivered to a carrier, and he is robbed of them, yet he shall be charged and answer for them by reason of the hire: and this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner that no proof could be had of it. And although it may be thought a hard case, that an innocent carrier who is robbed on the road should be answerable for all the goods he takes, yet the inconvenience would be far more intolerable if he were not so: for it would be in his power to pretend a robbery or some other accident, without a possibility of remedy to the party; the law will not expose him to so great a temptation, but he must be honest at his peril. 1 *Salk.* 143. 12 *Mod.* 482.

6. And, generally, if a man delivers goods to a common carrier, to carry to a certain place, if he loses or damages them, an action upon the case lies against him: for by the custom of the realm, he ought to carry them safely. 1 *Bac. Abr.* 343.

And if a person, who is not a common carrier, takes upon himself to carry my goods, though I promise him no reward, yet if my goods are lost or damaged by his default, I shall have an action against him: for the very taking of the goods is a general consideration, and renders him liable. *Id.*

7. A delivery to the carrier's servant is a delivery to the carrier; and if the goods are lost, an action will lie against the carrier.

CARTS. See WAGGONS.

CART-BOTE, an allowance to the tenant of wood sufficient for carts and other instruments of husbandry.

CARTHUSIAN monks were a branch of the benedictine order, and had their name from *Chartreux* (*Carthusia*) in France, where they were first instituted. They were brought into England by king Henry the second, and had their first house at Witham, in Somersetshire, and had, in the whole, nine houses in this kingdom. Their houses were called *Chartreux* houses, which by corruption have degenerated into *Charter* houses. Their rule was the most strict of any of the reli-

religious orders : for they were never to eat flesh ; and were obliged to feed on bread, water, and salt, one day in every week. They wore a hair shirt next their skins ; and were allowed to walk only once a week about their grounds.

CARUCATE (from *caruca*, a plough); as much land as can reasonably be tilled in a year by one plough.

CASE (action upon). *Action upon the case* is an universal remedy given for all personal wrongs and injuries with force; so called, because the plaintiff's whole *case* or cause of complaint is set forth at length in the original writ. For it is not brought (as in other actions) upon a writ formed in the Register ; but the writ varies according to the variety of the case. 3 *Black.* 122.

For although in general there are methods prescribed and forms of action previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like ; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed to bring a special action on his case, by a writ formed according to the peculiar circumstances of his own particular grievance. *Id.*

For wherever the law gives a right, or prohibits an injury, it also gives a remedy by action ; and, therefore, wherever a new injury is done, a new method of remedy must be pursued. 3 *Black.* 123.

And it is a settled distinction, that where an act is done, which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass with force and arms ; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass with force and arms will lie, but an action on the special case, for the damages consequent on such omission or act. *Id.*

Generally, in all cases, where a man hath a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. As if the parishioners of such a parish have a right to pass a ferry toll free, and are hindered of that right by the owner of the ferry;
every

every parishioner shall have an action upon the case against him, to assert that right. 1 *Comyns. Dig.* 140.

If a man, being intrusted in his profession, deceives him who intrusted him; as if a man retained of counsel, become afterwards of counsel with the other party in the same cause; or discover the evidence or secrets of his client; or, being retained to attend in court at such a day, doth not come, whereby the cause is lost; — this action lies. *Id.* 177.

So, if a man, by a false affirmation of a thing within his knowledge, deceive in the sale of goods; as if a taverner sell wine for sound and good, which he knows to be corrupt. *Id.* 178.

So, if he sell land, affirming the rent to be so much, when it is not, for the rent is certain, and lies within his own knowledge. *Id.* 179.

If a man lends an horse or other thing for hire, and the borrower misuseth it, an action upon the case lies against him. *Id.* 220.

If a man warrants an horse to be sound before sale, upon which another buys him, an action lies, for the warranting was the cause of buying; or, if he so warrants him before payment of the money, for that completes the bargain. *Id.* 181.

If a servant or apprentice, upon a sale of goods for his master, warrants them, it is a void warranty, for it is the sale of the master; and the warranty must be made by him that sells. *Id.* 180.

If a man, bound by prescription to repair fences against another, doth not do it, whereby the cattle of the other are damnified, or whereby cattle enter and do damage; — this action lies. *Id.* 225.

So, if a man be bound to the repair of a bridge, by the neglect whereof another hath a special damage; or, bound to repair a bank, doth it not, whereby the land of another is overflowed. *Id.*

So, if a man neglect to do that which he hath undertaken to do, an action upon the case lies: as if a man deliver goods to a carrier, to carry them to a certain place, and the carrier loses them, action of the case lies against him; for by the common custom of the realin, he ought to carry them safely. Or if any one, who is not a common carrier, undertakes to carry goods and to deliver them at such a place, if he doth not carry them, an action lies; and this, although the plaintiff doth not agree for a price certain, but says he will content him. *Id.*

Also this action lies for words spoken to or concerning another, whereby one is defamed and damnified. All scandalous words are actionable which may affect one's life or limb, his liberty, office or place of trust, trade, or preferment; or which disparage his title to his estate, or where the words tend to one's disherison, as by calling one bastard that is an heir to land; or where they tend to one's particular damage, and he is actually damaged thereby.—
4 Co. 15.

So, it lies for a nuisance to the habitation or estate of another; as if a man build an house hanging over the house of another, whereby the rain falls upon it: so if he stops the ancient lights of another house. 1 Com. Dig. 231.

But an action upon the case doth not lie for a common nuisance, for there the remedy can only be by indictment. Otherwise it is, where there is a special damage; as if a man make a ditch in the highway, and my horse falls into it; or if my servant falls in, and maims himself, whereby I lose his service; so if he lay logs in the highway, whereby my horse falls with me: in all these and the like cases, an action will lie to be satisfied in damages. Id. 234.

CASTELLAIN, the governor of a *castle* or fortified place. *Castellarium* is the precinct or jurisdiction of such castle. And *castellorum operatio* is castle work, or service of the tenants for building and upholding of castles; which was one of the three necessary charges (the *trinoda necessitas*) to which all lands among our Saxon ancestors were charged. Immunities from this charge were sometimes granted by the lords, *ut sint quieti de castellorum operibus*. *Castleward* was the service of guarding or watching at such castle.

CASTIGATORY (from *castigo*, to chastise) is the ducking stool provided for the punishment of scolding women, wherein they are plunged or soufed over head in the water.

CASUAL EJECTOR, anciently, in the trial of right to lands by ejectment, was a person, supposed *casually* or by accident to come upon the land, and turn out the lawful possessor. For, originally, in order to the trying the right by ejectment, several things were necessary to be made out before the court: First, a *title* to the land in question; upon which he was to make a formal entry: and, being so in possession, he executed a *lease* to some third person or lessee,
Vol. I. L leaving

leaving him in possession: then the prior tenant, or some other person (either by accident or by agreement beforehand), came upon the land and turned him out: and for this *ouster* or turning out, the action was brought. But now all these formalities are dispensed with, except the mere trial of the title. 3 *Black.* 202.

CASU CONSIMILI is a writ of entry, granted where tenant by the curtesy, or tenant for life aliens in fee, or in tail, or for another's life. And it is brought by him in reversion against the party to whom such tenant so aliens to his prejudice, and in the tenant's life-time. It takes its name from this; that the clerks of the chancery did, by their common assent, frame it to the *likeness* of the writ called *In casu proviso*, according to the authority given them by the statute of *Westminster* 2. c. 24. which statute, as often as there happens a new case in chancery something like the former, yet not specially fitted by any writ, authorises them to frame a new form answerable to the new case, and as like the former as may be. 7 *Co.* 4. *F. N. B.* 206.

CASU PRIVISO is a writ of entry given by the statute of *Gloucester*, c. 7. where a tenant in dower aliens in fee, or for life; and it lies for him in reversion against the alienee. This writ, and the writ of *casu consimili*, suppose the tenant to have aliened in fee, though it be for life only; and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien. But if an ancestor lease for life, and the tenant alien in fee, the heir in reversion must have this writ with the title included therein. *F. N. B.* 205, 6.

CATCHPOLE, one of the sheriff's bailiffs, so called because he *catches* by the *poll* or head the party arrested.

CATHEDRAL. After the establishment of Christianity, the emperors and other great men gave large demesnes and other possessions for the maintenance of the clergy, whereon were built the first places of public worship, which were called *cathedrae*, *cathedrals*, *sees*, or *seats*; from the clergy's residence thereon. And when churches were built in the country, the clergy were sent out from the cathedrals to officiate in those churches, the cathedral or head seat remaining to the bishop, with some of the chief of the clergy as his assistants.

CATHE-

CATHEDRATICUM. In honour of the *cathedral* church, and in token of subjection to it, every parochial minister within the diocese pays to the bishop an annual pension, called *cathedraticum*; but, from its being usually paid at the bishop's *synod* or visitation, it commonly goes under the name of *synodals*.

CATTLE, from *Ireland*, by several acts of parliament, are prohibited to be imported: but of late years these restrictions are taken off by temporary acts, and all sorts of cattle permitted to be imported from Ireland duty free.

By the articles of the Union, *Scotch* cattle in *England* shall be liable to no other duties than *English* cattle. 5 *An. c.* 8.

And by 5 *G. 3. c.* 43. cattle may be freely imported from the ile of *Man*.

By 3 & 4 *Ed. 6. c.* 19. no person shall buy any cattle and sell the same again in the same market or fair, on pain of forfeiting double. And this act continues in force, although the other acts against forestalling, ingrossing, and regrating, are repealed by 12 *G. 3. c.* 71.

Killing cattle in the *night-time* is felony and transportation; and wounding any cattle in the night-time incurs a forfeiture of treble damages. 22 & 23 *C. 2. c.* 7.

Stealing any cattle or sheep, or killing the same with intent to steal the whole carcase or any part thereof, is felony without benefit of clergy. And 10*l.* reward is given for convicting an offender. 14 *G. 2. c.* 6. 15 *G. 2. c.* 34.

By the *black act*, 9 *G. c.* 22. killing or wounding any cattle is made felony without benefit of clergy: and the hundred shall answer damages.

To prevent spreading of the *distemper* amongst the horned cattle, the king by his proclamation may prohibit the importation of hides or skins, or any other part of any cattle or beast, under such regulations as he shall think fit. 9 *G. 3. c.* 39.

CAVEAT is a caution entered in the spiritual court, to stop probates, administrations, licences, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it.

And a *caveat* is of such validity by the ecclesiastical law, that if an institution, administration, or the like, be granted pending such *caveat*, the same is void: but this the temporal courts pay no regard to. 3 *Black. 246.*

CERTIFICATE is a writing made in any court, to give notice to another court of any thing done therein, which is usually by way of transcript. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it, containing the tenor and effect of what is done.

Sometimes where a question of law arises in the court of chancery, the lord chancellor refers it to the judges of the court of king's bench or common pleas, upon a case stated for that purpose; who thereupon, having heard counsel on both sides, *certify* their opinion to the chancellor. 3 *Black.* 453.

So there is a *certificate* of a judge upon trial of a cause at nisi prius: as where it is enacted by several statutes, that if the jury in an action of trespass give less damages than 40s. the plaintiff shall have no more costs than damages, unless the judge shall *certify* under his hand that the trespass was wilful and malicious. There is also a certificate of a judge certifying the conviction of a felon, to entitle the prosecutor to an exemption from parish offices, and to a pecuniary reward for such conviction. 3 *Black.* 214.

Sometimes a *certificate* from a proper officer is admitted, without finding the matter by verdict of a jury; as the custom of the city of *London* with respect to the distribution of the effects of freemen deceased, is certified by the mouth of the recorder. 3 *Black.* 334.

Certificate of assize of novel disseisin is a writ granted for the re-examining of a matter passed by assize before the king's justices, directed to the sheriff, commanding him to call the parties before the justices on such a day, that the matter may be further examined. *F. N. B.* 181.

Certificate de recognitione stapule is a writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him, where the party himself detains it, and refuses to bring in the same. *Reg. Orig.* 152. There is a like writ to certify a statute merchant, and in divers other cases. *Id.* 148. 151.

On certificate to the lord chancellor by four parts in five of a *bankrupt's* creditors, that the bankrupt hath made an honest discovery of his effects, and conformed to the directions of the law, the bankrupt shall be intitled to a ratable allowance out of his effects.

So there is a certificate of the settlement of a poor person, by the churchwardens and overseers, to entitle the party obtaining

obtaining the certificate to reside in another parish without molestation, so long as he shall not become chargeable to such other parish.

CERTIORARI is an original writ, issuing out of the court of chancery or of the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice, before the king or such justices as he shall assign to determine the cause. 1 *Bac. Abr. Certiorari*.

A certiorari lies in all judicial proceedings, in which a writ of error doth not lie; and it is a consequence of all inferior jurisdictions erected by act of parliament, to have their proceedings returnable in the king's bench. *L. Raym.* 469.

But it seems agreed, that a certiorari shall not be granted to remove an indictment after a conviction, unless for some special cause, as where the judge below is doubtful what judgment to give. 2 *Harv.* 288.

Also it seems a good objection against the granting it, that issue is joined in the court below, and a *venire* awarded for the trial of it. *Id.*

After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings on the record removed by it erroneous. *Id.* 293.

But it has been adjudged, that if a certiorari for the removal of an indictment before justices of the peace be not delivered before the jury be sworn for the trial of it, the justices may proceed. 2 *Harv.* 294.

And the justices may set a fine to complete their judgment, after a certiorari delivered. *L. Raym.* 1515.

Every return of a certiorari ought to be under seal. And if the person, to whom it is directed, do not make a return, then an *alias*, that is, a second writ, then a *pluries*, that is, a third writ, shall be awarded, and then an attachment. *Crompt.* 116.

CESSAVIT is a writ that lieth in divers cases, upon this general ground, that he against whom it is brought hath for two years *ceased* or neglected to perform such service or to pay such a rent as he is bound to by his tenure, and hath not upon his lands or tenements sufficient goods or chattels

to be distrained. And if a tenant for years of land at certain rent suffers the rent to be behind two years, and there is no such distress to be had upon the land; then the landlord shall recover the land: but if the tenant come into court before judgment given, and tender the arrearages and damages, and find security that he shall *cease* no more in payment of the rent, then the tenant shall not lose his land, *F. N. B.*

CESSION, *cessio*, signifies a *cessing*, yielding up, or giving over; and is, when an ecclesiastical person having a benefice with cure of souls, takes another benefice incompatible.—For by the statute of 21 *H. 8. c. 13.* if any one having a benefice with cure of souls of 8*l.* a year or upwards in the king's books, accepts any other without a dispensation, the first shall be adjudged void, and the patron may present as if the incumbent had died or resigned. And a vacancy thus made for want of a dispensation, is called cession. 1 *Black.* 392.

But the avoidance of the former benefice doth not take place as to lapse, till induction to the second: for though the patron hath six months from the induction to present to save the incurring of a lapse, yet he may, if he pleases, present before the induction. *Bur. Mansf.* 1512.

Cession is not made by taking a deanry, archdeaconry, prebend, or rectory, where there is a vicarage endowed; because the statute only extends to benefices *with cure of souls*.

But where an ecclesiastical person is made bishop, his former benefices become void by cession, and the king shall present to the benefices so vacated; for the avoidance made by promotion to a bishoprick is only changing one life for another, and therefore is no prejudice to the patron; for which reason, the law allows the king to present for that turn. But the king, if he pleases, may grant to the bishop a dispensation to retain his former preferment, which dispensation is called a *commendam retinere*.

CESTUY QUE TRUST is he who hath a trust in lands and tenements committed to him for the benefit of another. If the person intrusted doth not perform his trust, he is compellable thereto in a court of equity.

CESTUY QUE VIE is he for whose life land is holden by another person, which other person is therefore called tenant *pur autre vie*, or tenant for another's life.

CESTUY

CESTUY QUE USE is he to whose use land is granted to another person, which other person is called the *terre-tenant*, having in himself the legal property and possession, yet not to his own use, but to dispose thereof according to the intention of the *cestuy que use*, and to suffer him to take the profits.

CHAIRS. See **COACHES.**

CHAISES. See **COACHES.**

CHALLENGE, of jurors, is of two kinds; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel* or little square *pane* of parchment on which the jurors names are written: or to the *polls*; by which are meant the several particular persons or *heads* in the *array*. 1 *Inst.* 156. 158.

Challenge to the *array* is in respect of the partiality or default of the sheriff, coroner, or other officer that made the return: and it is two-fold: 1. *Principal* challenge to the *array*, which, if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers. As if the sheriff is of kindred to either party; or if any of the jurors be returned at the denomination of either of the parties. 2. Challenge to the *array for favour*; which being no principal challenge, must be left to the discretion and conscience of the triers. This is, where either of the parties suspects that the juror is inclined to favour the opposite party. *Id.*

Challenge to the *polls* is three-fold: 1. *Peremptory*, where a man challenges upon his own dislike of the juror, without shewing any cause. 2. *Principal* challenge to the *polls*; where cause is shewed, but which, if found true, stands sufficient of itself, without leaving any thing to the triers. 3. Challenge to the *polls for favour*; which is, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the triers, upon hearing the evidence, to find the juror favourable or not favourable. —Causes of challenge to the *polls* are infinite. *Id.*

CHALLENGE TO FIGHT. See **DUEL.**

CHAMPERTY, *campi partitio*, is the unlawful maintenance of a suit, in consideration of some bargain to have

part of the lands or thing in dispute, or part of the gains. By the statute 33 *Ed. 1.* §. 3. both the champertor, and he who consents thereunto, shall be imprisoned three years, and make fine at the king's pleasure. And by 1 *R. 2. c. 9.* feoffments of lands and gifts of goods for maintenance shall be void, and the person disseised shall recover the lands with double damages.

CHANCEL of a church, *cancellus*, is so called a *cancellus*, from the lattice-work partition between the quire and the body of the church, so framed as to separate the one from the other, but not to intercept the sight.

Generally, the rector or parson is bound to the repair of the chancel; but where the custom hath been for the parish, or for the vicar, or for the owner of a particular estate, to repair the chancel, that custom is good. *Gibf.* 199. And the repairing of the chancel is *prima facie* a discharge from contributing to the repairs of the church. *Id.*

It hath been said, that the parson, or rector impropriate, is intitled to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy*, 153. But where there is no prescriptive right, it seems that the bishop hath the same power of disposing of the seats in the chancel, as he hath in the body of the church. *Gibf.* 200.

CHANCELLOR OF A DIOCESE is an ecclesiastical officer under the bishop, whose office includes in it the power both of an *official principal* and *vicar general*. The proper work of an *official* is, to hear causes between party and party, concerning wills, legacies, mortuaries, and other like temporal matters. The office of *vicar general* is, the exercise and administration of jurisdiction purely spiritual, as visitation, correction of manners, granting institutions, and the like, with a general inspection of men and things, in order to the preserving of discipline and good government in the church.

CHANCELLOR, Lord. See CHANCERY.

CHANCEMEDLEY signifies a casual meddling or contention, and, in common speech, is applied to any manner of homicide by misadventure, whereas in strictness and propriety it is only applicable to such killing as happens in self-defence upon a sudden rencounter, when the slayer hath no other

other possible means of escaping from the assailant. As where the slayer, either having not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide by chancemedley. 4 *Black.* 184.

CHANCERY, in matters of civil property, is the highest and most important of the king's superior and original courts of justice. It hath its name of *chancery*, *cancellaria*, from the judge who presides therein, the lord *chancellor* or *cancellarius*; which name and office, under the Roman emperors, signified a chief scribe or secretary. And when the modern kingdoms of *Europe* were established upon the ruins of the empire, almost every state preserved its chancellor, who had the supervision of all charters, letters, and other public instruments of the crown, and *cancelled* or authenticated them as circumstances might require. 3 *Black.* 46.

And when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor or lord keeper of the great seal (whose authority with us is one and the same) is created by the mere delivery of the king's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedence to every temporal lord. He is a privy counsellor by his office, and prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom; he is visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of 20 *l.* a-year in the king's books. He is general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exerciseth in his judicial capacity in the court of chancery. 3 *Black.* 46.

In the chancery are two courts; one ordinary, being a court of *common law*; the other extraordinary, being a court of *equity*. The ordinary or *common law* court is a court of record. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea on all personal actions, where any officer of this court is a party;

party; and of executions on statutes, or of recognizances in nature of statutes; and, by several acts of parliament, of divers other offences and causes; but this court cannot try a cause by a jury, but the record is to be delivered by the lord chancellor into the king's bench to be tried there, and judgment given thereon. And when judgment is given in this common law part of chancery upon demurrer, or the like, a writ of error lies returnable into the king's bench; but this hath not been practised for many years. From this court also proceed all original writs, commissions of charitable uses, bankrupts, sewers, idiots, lunatics, and the like; and for these ends this court is always open. 3 *Black.* 47. *Wood, b. 4. c. 1.*

The extraordinary court is a court of *equity*, and proceeds by the rules of equity and good conscience. This equity consists in abating the rigour of the common law, and giving a remedy in cases where no provision, or not sufficient provision, hath been made by the ordinary course of law. The jurisdiction of this court is of vast extent. Almost all causes of weight and moment, first or last, have their determination here. In this court relief is given in the case of infants, married women, and others not capable of acting for themselves. All frauds, for which there is no remedy at law, are cognizable here; as also all breaches of trust, and unreasonable or unconscionable engagements. It will compel men to perform their agreements; will relieve mortgagors and obligors against penalties and forfeitures, on payment of principal, interest, and costs; will rectify mistakes in conveyances; will grant injunctions to stay waste; and restrain the proceedings of inferior courts, that they exceed not their authority and jurisdiction. *Id.*

The method of proceeding in equity is, first, to file the *bill* of complaint, setting forth the injury done, and praying relief. After the bill is filed, process of *subpœna* issues to compel the defendant to appear. On his appearance, if there is no cause of plea in bar, he puts in his *answer*. Then the plaintiff brings his *replication*, unless he files *exceptions* against the answer as insufficient. The several pleadings being settled, and the parties come to issue, *witnesses* are examined upon interrogatories, either in court, or by commission in the country. And when the plaintiff and defendant have examined their witnesses, *publication* is to be made of the depositions, and the cause set down for hearing. After which follows the *decree*; which decree being served

served on the party under the seal of the court, and not obeyed, all the processess of contempt will issue out against him for his *imprisonment* till he yields obedience to it; or there may be an *injunction* granted for the possession of land, where the decree is for land, and the party remains obstinate after his imprisonment. From this court an appeal lies to the House of Lords, the last resort of temporal jurisdiction in this kingdom.

CHAPELS, *capellæ*, are of divers kinds :

1. *Private chapels* ; such as noblemen and other religious and worthy persons have, at their own private charge, built in or near their own houses, for them and their families wherein to perform religious duties. These, and the ornaments belonging to the same, are maintained at those persons charge to whom they belong, and chaplains provided for them by themselves. *Degge. Part 1. c. 12.*

2. *Free chapels*, so called from their freedom or exemption from all ordinary jurisdiction. All free chapels, together with the chantries, were given to the king in the first year of the reign of *Edward the Sixth*, except some few that are excepted in the acts of parliament by which the others were given ; and except such as have been founded by the king, or by his licence, since the dissolution. And the king himself visits his free chapels, and not the ordinary ; which office of visitation is executed for the king, by the lord high chancellor. *Godolph. 145.*

3. *Chapels of ease* under the mother church, built for the ease of the parishioners especially in larger parishes. Some of these chapels of ease have parochial rites granted to them by the ordinary, of baptism and sepulture : others have only the privilege of prayers and preaching. At the foundation of these chapels it is generally provided that they shall be no prejudice to the mother church, either in revenues or in exemption from subordination and dependence.

CHAPTER of a cathedral church consists of persons ecclesiastical, dean, and canons or prebendaries, whereof the dean is the head ; all subordinate to the bishop, to whom they are as assistants in matters relating to the church, for the better ordering and disposing the things thereof, and the confirmation of such leases of the temporalities and offices relating to the bishoprick, as the bishop shall make from time to time. And they are termed *capitulum*, as a kind of head, instituted

instituted not only to assist the bishop in manner aforesaid, but also anciently to rule and govern the diocese in the time of vacation.

CHARITIES : the king has the general superintendence of all charities ; which he exercises by the lord chancellor. And by the statute 43 *Eliz. c. 4.* authority is given to the lord chancellor to grant commissions to inquire into any abuses of charitable donations, and rectify the same by decree.

But by the 9 *G. 2. c. 36.* no lands, or money to be laid out in lands, shall be given to any charitable use, unless by deed indented, executed twelve months before the death of the donor, and inrolled in chancery within six months after execution, and unless made to take effect immediately, and be without power of revocation.

Concerning the collecting of charity money on *briefs*. See **BRIEF**.

CHARTER, *charta*, a written paper or parchment, is of divers kinds, and distinguished into charters of the *king*, and charters of *private* persons. Charters of the *king* are those whereby the king passeth any grant to any person or body politic, as charters of exemption, of privilege, of pardon; the *great* charter of liberties is called by way of pre-eminence, *magna charta*. Charters of *private* persons are deeds and instruments for conveyance of lands.

CHARTER HOUSE is a corruption of *Chartreux* (*Carthusia*) the name of a town in *France*, where an order of monks was instituted, from thence called *Carthusians*.

CHARTER LAND was land held by writing, otherwise called *book land*; as opposed to *falkland*, which was an inferior kind of tenure, without writing, held merely at the will of the lord.

CHARTER PARTY, *charta partita*, is a deed or writing *divided*, or pair of indentures, among merchants or seafaring men, containing the covenants and agreements made between them, touching their merchandize and maritime affairs.

A charter party of *affreightment* settles agreements, as to the cargo of ships, and binds the master to deliver the cargo

cargo in good condition, at the place of discharge, according to agreement : and sometimes the master obliges himself, ship, tackle, and furniture, for performance.

CHASE is a privileged place for receipt of deer and beasts of the forest, and is of a middle nature between a forest and a park. It is commonly less than a forest, and not endowed with so many liberties, as officers, laws, courts ; and yet is of a larger compass than a park, having more officers and game than a park. Every forest is a chase, but every chase is not a forest. It differs from a park in that it is not inclosed ; yet it must have certain metes and bounds, but it may be in other men's grounds as well as in one's own.

Manno. 49.

Beasts of chase are the buck, doe, fox, martern, and roe.

Id. 44.

A forest is governed by the forest law, but a chase is governed by the common law. *Id.* 52.

CHATTELS is a *French* word, and signifies *goods*, comprehending all goods, moveable and immoveable ; except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real* : *Personal* are such as belong immediately to the person of a man ; and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action : chattels *real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with writings of land ; or such as are issuing out of some immoveable thing, as a lease, or rent for term of years ; and they concern the realty, lands and tenements, interest in advowsons, in statutes merchant, and the like. 1 *Inst.* 118.

CHAUNTRIES, *cantaria*, in the times of popery, were endowments of land or other revenues, for maintenance of one or more priests, to celebrate daily mass for the souls of the founder and his kindred, and of their other benefactors ; sometimes at a particular altar, and oftentimes in little chapels added to cathedral and parochial churches for that purpose.

CHEATS, punishable by fine and imprisonment at the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another
6 of

of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; by causing an illiterate person to execute a deed to his prejudice; reading it over to him in words different from those in which it was written; and such like. 1 *Haw.* 188.

Also the person injured by such fraud may have an action upon the case for damages; as where a person sells one commodity for another, or sells by false weights and measures: in which, and the like cases, an action will lie upon the contract, because the law always implies that every transaction is fair and honest. In buying and selling, it is always understood, that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also if he that sells any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer; otherwise it is an injury to good faith, for which an action on the case will lie to recover damages. 3 *Black.* 164.

As there are some frauds which may be relieved civilly, and not punished criminally, (with the complaints whereof the courts of equity commonly abound;) so there are other frauds which may not be helped civilly, and yet shall be punished criminally: thus, if a man goes about, and pretends to be of age, and defrauds many persons by taking credit for considerable quantities of goods, and then insists on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat.

And the distinction in all cases of the like kind is this: that, in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done to him; but where false weights or measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Bur. Mansf.* 1125.

By statute 33 *H. 8. c. 1.* if any person shall falsely and deceitfully obtain any money or other goods, by colour and

means of any false privy token, or counterfeit letter made in another man's name; he shall have such punishment by imprisonment, pillory, or other corporal pain (except death), as the court shall award.

By 30 G. 2. c. 24. all persons who by false pretences shall obtain any money, goods, or merchandize, with intent to defraud any person of the same, shall be fined and imprisoned, or put in the pillory, or publicly whipped, or transported for seven years, at the discretion of the court.

By 9 An. c. 14. if any person shall, by cheating in any kind of gaming, win any money or other thing, he shall forfeit five times the value, and suffer as in case of perjury.

CHEVISANCE (from the French, *achever* or *chevir*, to complete or come to the (*chief*) head, or end) signifies an agreement or composition made, and in our statutes is used for a bargain or contract in general; and not, as some have thought, as denoting particularly an unlawful or indirect agreement only; for, in the instances produced, it is used to signify the same as the words *bargain* or *contract*; and is still retained in all commissions of bankrupt, in which the bankrupt is stated to use and exercise the trade of merchandize, by way of bargaining, exchange, bartering, and *chevisance*.

CHIEF, tenure in, was the most honourable species of holding lands and tenements, and belonged only to those who held immediately of the king in right of his crown and dignity, who were called the king's tenants in *chief*, or in *capite*. But by the 12 C. 2. c. 24. all these kinds of tenure are abolished, and turned into free and common socage.

CHILD. See PARENTS AND CHILDREN.

CHIMINAGE (Fr. *chimin*, a way), a toll due by custom for having a way through a forest: if it was a footway only, it was called *pedage*.

CHIMNEY-SWEEPERS. By 28 G. 3. c. 48. several regulations are made respecting chimney-sweepers and their apprentices; and all differences and disputes between them are to be determined by one justice of the peace.

CHIPPING,

CHIPPING, when it is part of the name of a place, denotes such place to be a market town: as *Chippenham*, *Chipping Norton*, from the Saxon *cyppan*, *ceapan*, to buy; whence *cheapen*. So *chippin-gavel*, a toll for buying and selling.

CHIROGRAPH (from *χειρ*, a hand, and *γραφω*, to write) signifies a deed, or other public instrument in writing, which anciently were attested by the subscription and crosses of witnesses; afterwards, to prevent frauds and concealment, they made their deeds of mutual covenant in a *script* and *rescript*, or in a *part* or *counterpart*, and in the middle between the two copies they drew the capital letters of the alphabet, and then tallied or cut asunder, in an *indented* manner, the sheet or skin of parchment; which, being delivered to the two parties concerned, were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa*, or handwritings. 2 *Black.* 296.

Chirograph was also used for a fine; the manner of ingrossing whereof, and cutting the parchment in two pieces, is still observed in the *chirographer's* office. 14.

CHIVALRY, court of, was anciently held before the lord high constable and earl marshal of *England* jointly, and afterwards before the earl marshal only. This court hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. It is now grown intirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record. 3 *Black.* 68.

CHIVALRY, tenure in. See **KNIGHTS SERVICE**.

CHOCOLATE. See **COFFEE**.

CHOSE is a French word, and signifies *thing*; and a *chose in action* is a thing of which a man hath not the possession or actual enjoyment, but hath a right to demand the same by action. For property in things personal is of two kinds, either in *possession*, where a man has not only the right to enjoy, but also the actual enjoyment of the thing; or else it is in *action*, where a man hath only a bare right, without any occupation or enjoyment. The possession whereof, however,

ever may be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or *chose in action*. 2 *Black.* 389. 397.

Thus money due on a bond is a *chose in action*; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. *Id.* 397.

If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompence for this damage is a *chose in action*: for though a right to some recompence vests in me, at the time of the damage done, yet what and how large such recompence shall be, can only be ascertained by verdict; and the possession can only be given to me by legal judgment and execution. *Id.*

CHURCH:

1. The letters *ch* were anciently pronounced hard, as the letter *k*. In the northern parts of *England*, as also in *Scotland*, the ancient pronunciation is still retained in the word *kirk* or *kirk*; being as it were *κῆριον ο.κός*, the Lord's house, or *κῆριον*, belonging to the Lord.

2. By the common law and general custom of the realm, it was lawful for earls, barons, and others of the laity, to build churches; but they could not erect a spiritual body politic to continue in succession, and capable of endowment, without the king's licence; and, before the law shall take knowledge of them as such, they must also have the bishop's leave and consent, and be consecrated or dedicated by him. 3 *Inst.* 203.

3. And after a new church is erected, it may not be consecrated without a competent endowment: which endowment was commonly made by an allotment of manse and glebe by the lord of the manor, or other, who thereby became patron of the church. Other persons also, at the time of dedication, often contributed small portions of ground; which is the reason, why, in many parishes, the glebe is not only distant from the church, but lies in scattered divided parcels. *Ken. Par. Ant.* 222.

4. As to the form of consecration:—In the year 1661, a form for this purpose was drawn up by the convocation, but was not authorized by authority; and now every bishop as to this matter is left to his own judgment and discretion.

But that form, as drawn up by the convocation, seems to be generally followed.

5. The anniversary feast on the day of the dedication of the church continued a long time, and is still kept up in many places; and this, drawing together a large resort of people, was the original of fairs on that day. And from thence in such places may probably be conjectured to what saint the church was dedicated. *Ken. Par. Ant.* 609.

6. Of common right, the *repair* of the church is in the parishioners, at least of the body of the church; and sometimes of the chancel, as particularly in *London*, in many churches there. But, generally, the parson, or lay impropiator, is bound to repair the chancel: sometimes the vicar is bound, but this must be by special custom. An ile in a church, belonging to a particular family, is commonly repaired by those to whom it belongs. If two churches be united, the repairs of the several churches shall be made as before their union. *Degge, Part 1. c. 12.*

7. Before the age of the reformation, no *seats* were allowed, nor any distinct apartment in a church assigned to distinct inhabitants, except for some very great persons. The seats that were, were moveable, and the property of the incumbent, and so in all respects at his disposal. And, generally, the seats in churches are to be built and repaired as the church is to be, at the general charge of the parishioners, unless any particular person be chargeable to do the same by prescription. *Id.*

And although the freehold of the body of the church be in the incumbent thereof, and the seats therein be fixed to the freehold, yet the use of them is common to all the people that pay to the repair thereof. But the authority of appointing what persons shall sit in each seat is in the ordinary. But, by custom, the churchwardens may have the ordering of the seats, as in *London*; which, by the like custom, may be in other places. *Watf. c. 39.*

If a man prescribe, that he and his ancestors, and all they whose estate he hath in a certain messuage, have used to sit in a certain seat in the church time out of mind, in consideration that they have used time out of mind to repair the said seat, it is a good prescription: but if he prescribe to have a seat generally, without the said consideration of repairing the seat, the ordinary may displace him. *2 Roll's Abr.* 288.

A seat

A seat may not be granted by the ordinary to a person and his heirs absolutely. For the seat doth not belong to the person, but to the inhabitant; otherwise, if he and his heirs go away, and dwell in another parish, they might yet retain the seat, which would be unreasonable. *Gibf.* 197.

The title to a seat, on the foundation of prescription, is properly liable at common law. But for a disturbance in a seat, a man may sue in the spiritual court; and the defendant, if he will, may admit the prescription to be tried there; as a defendant doth a modus, or a pension, by prescription. *2 Salk.* 551.

In an action for disturbing the plaintiff in his pew, the plaintiff need not prove that he repaired it against a stranger; for this being a possessory action against a stranger, and a mere wrong doer, the plaintiff is not obliged to prove any repairs done by himself or others whose estate he hath; for it is a rule in law, that one in possession need not shew any title or consideration for such possession against a wrong doer. But it is otherwise where one claims a pew or an ile in a church against the ordinary, who has *prima facie* the disposal of all the seats in the church; and against him a title or consideration must be shewn in the declaration, and proved upon the trial. *1 Wilsf.* 326.

8. Rates for reparation of the church are to be made by the churchwardens together with the parishioners assembled upon public notice given in the church. And the major part of them that appear shall bind the parish; or if none appear, the churchwardens alone may make the rate. *1 Bac. Abr.* 373.

The rate is not chargeable upon the land, but upon the person in respect of the land. And houses, as well as lands, are chargeable; and, in some places, houses only: as in cities and large towns where there are only houses, and no lands to be charged. *Hell.* 130.

It hath been holden, that there ought to be two rates, one for the fabric, and another for the goods and ornaments, of the church: for that a rate for the reparation of the fabrick is real, charging the land, and not the person, but a rate for ornaments is personal, upon the goods, and not upon the land. *2 Roll's Abr.* 291. But by reason of the trouble and inconvenience attending such separate assessments, the practice hath now universally obtained to make one assessment for all. *Degge, Part 1. c. 12-*

If any person find himself aggrieved at the inequality of any such assessment, his appeal must be to the ecclesiastical judge. *Id.*

9. If any person shall, by words only, *brawl* in any church or church-yard, he shall be suspended from the entrance of the church; if he *smite* or lay violent hands on another, he shall be *ipse facto* excommunicate: if he shall therein strike with any *weapon*, or draw any weapon to strike, he shall have one of his ears cut off, and if he have no ears, he shall be turned in the cheek with the letter F, whereby he may be known to be a fray-maker and fighter. 5 & 6 *Ed. 6. c. 4.*

13. The way to a church may be claimed and maintained by libel in the spiritual court. *Gibf. 293.*

CHURCHWARDENS:

1. Persons exempted from the office of churchwarden are, all peers of the realm, by reason of their dignity; clergymen, by reason of their order; members of parliament, by reason of their privilege; attorneys, by reason of their attendance in the king's courts; apothecaries, having served seven years apprenticeship; persons having prosecuted a felon to conviction; dissenting teachers; and other dissenters, provided they find a sufficient deputy. And by 26 G. 3. c. 107. c. 130. all serjeants, corporals, and drummers of the militia; and also all private men from the time of their enrolment, until they are discharged; shall not be liable to serve as churchwardens.

2. By *Can. 118.* churchwardens shall be chosen yearly in Easter week, or some week following, as the ordinary shall direct.

3. And they shall be chosen by the joint consent of the minister and parishioners, if it may be; if not, the minister shall chuse one, and the parishioners another. *Can. 89.*

But this is to be understood, where there is not a custom for the parishioners to chuse both. *L. Raym. 137.*

In some places, the lord of the manor prescribes for the appointment of churchwardens; and this shall not be tried in the ecclesiastical court, although it be a prescription of what appertains to a spiritual thing. *God. 153.*

4. A person elected churchwarden, and refusing to take the oath according to law, may be excommunicated for such refusal; and no prohibition will lie. *Gibf. 216.*

5. If

5. If the party chosen offer himself, and the ecclesiastical judge refuse to tender the oath to him, a mandamus from the temporal court will be granted. For the ecclesiastical judge is not to determine concerning the fitness or unfitness: and a churchwarden is a temporal officer, and hath the property and custody of the goods of the parish. And as it is at the peril of the parishioners, so they may chuse and trust whom they think fit; and the spiritual judge hath no power to elect, or controul their election. 1 *Salk.* 166.

6. The churchwardens are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them; also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or to take by grant, except in *London*, where they are a corporation for those purposes also. *Gibf.* 215.

Every churchwarden is an overseer of the poor, by the statute 43 *Eliz. c. 2.*

They have power to manage the revenues of the church during a vacancy. In which case, having first taken out a sequestration under the seal of the office, they are to take care that the glebe land be seasonably tilled and sown, to gather in tithes, thresh, and sell out corn, repair houses and fences, and what other things are necessary; and to provide for the supply of the cure. And when a successor is instituted and inducted, they are to account to him for the profits received by them, deducting their reasonable expences: and if they cannot agree, the same shall be settled by the ordinary. *Watf. c. 30.*

The release of one churchwarden is in no case a bar to the action of the other; for what they have is to the use of the parish. *Cro. Ja.* 34.

7. All churchwardens, at the end of their year, or within a month after, shall, before the minister and parishioners, give up a just account of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church. And they shall deliver up to the parishioners whatsoever money, or other things, of right belonging to the church or parish, which remain in their hands, that it may be delivered over by them to the next churchwardens. *Canon* 89.

If the churchwardens have laid out the parish money imprudently, yet if it be truly and honestly laid out, they must be reimbursed; and the parishioners can have no re-

medy herein, unless some fraud be proved against them, because the parish have made them their trustees. *Gibf.* 196.

CHURL, *ceorl, carl*, was, in the Saxon times, a tenant at will, who held lands on condition of certain rents and servile duties. Hence many villages bear the name of *Carleton*, being the place where those carls inhabited. *Carl*, in German, is strong, and the word is still used in Scotland, to denote a rustic, countryman, or labourer.

CINQUE PORTS (*quinque portus*) are the five most important havens, as they formerly were esteemed, in the kingdom, lying towards France, viz. *Dover, Sandwich, Romney, Hastings, Hythe*; to which *Winchelsea* and *Rye* have since been added. They have a special governor or keeper of their own, called by his office lord warden of the cinque ports, who hath also jurisdiction of admiralty, and is exempt from the admiralty of England. He is also constable of *Dover castle*. 4 *Inst.* 223.

They have had several privileges granted to them, and an exclusive jurisdiction, before the mayor and jurats of the ports, in which the king's ordinary writ doth not run. But a writ of error lies from the mayor and jurats of each port to the lord warden of the cinque ports in his court of *Shepway*; and from the court of *Shepway* to the king's bench. And all prerogative writs, as those of *habeas corpus*, *prohibition*, *certiorari*, and *mandamus*, may issue to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. 3 *Black.* 79.

CIRCUMSPECTE AGATIS, is the title of a statute made in the 13 *Ed.* 1. relating to prohibitions, prescribing certain cases wherein the king's prohibition doth not lie.

CIRCUMSTANTIAL EVIDENCE is, where the fact cannot be positively and demonstratively proved, and therefore *circumstances* are applied in order to strengthen the evidence; which circumstances, as they are more or less strong, induce either a *violent* presumption, which is equivalent to full proof; or *probable* presumption, which also hath its due weight; or *light* presumption, which hath little or no weight or validity.

CISTERTIAN

CISTERTIAN monks were an order instituted at *Cisteaux* in *France*, who came into *England* about the year 1128, and had their first house at *Waverley* in *Surry*. Before the dissolution they had 85 houses in this kingdom, which were generally founded in solitary and uncultivated places: and all dedicated to the Blessed Virgin.

CITATION is a summons to appear, being a process particularly applied to the ecclesiastical courts. The party to whom it is directed shall diligently seek the person to be cited; and when he hath found him, he is to shew to the person cited, the citation under seal, and by virtue thereof cite him to appear at the time and place appointed. And it is usual also to leave a note with him, expressing the contents thereof. 1 *Ought.* 44, 45.

But if it be returned upon the citation that the defendant cannot be found, then the plaintiff's proctor petitions that the defendant may be cited personally (if he can), to appear and answer the contents of the former citation; and if not personally, then by any other ways and means, so as the party to be cited may come to the knowledge thereof, and this is that which is called a citation *viis et modis*, or a public citation, seeing it is executed either by public edict, a copy thereof being affixed to the doors of the house where the defendant dwells; or the doors of the parish church where he inhabits, for the space of half an hour in the time of divine service; or, as it hath been said, by the tolling of a bell, or the sounding of a trumpet, or the erecting of a banner: this being done, a certificate must be made of the premises, and the citation brought into court; and if the party cited appear not, the plaintiff's proctor accuseth his contumacy (he being first three times called by the crier of the court), and in penalty of such his contumacy, requests that he may be excommunicated. 1 *Ought.* 49.

But the citation must be served at the door or outside of a man's house; for the house may not be entered in such case without his consent. *Lindw.* 87.

CITY, *civitas*, is a town incorporated, which is or hath been the see of a bishop: and though the bishoprick be dissolved, as at *Westminster*, yet still it remaineth a city. 1 *Inst.* 109.

But in ancient time, the word city is used promiscuously with burgh or town; as in the charter of *Leicester*, it is called

both *civitas* and *burgus*; which shews, that though the word *city* generally signifies such a town corporate as hath a bishop and cathedral church, yet there are some exceptions.

CIVIL LAW is the law of the ancient *Romans*, collected in the books called the *Code*, the *Digest*, the *Institute*, and the *Novels*. It was heretofore much in use in this kingdom; and is still admitted in a considerable degree in the ecclesiastical courts, the courts of equity and of the admiralty, and in the courts of the two universities.

CLAIM is a challenge of interest in any thing that is in the possession of another; or at least out of a man's own possession; and may be either *verbal*, where one doth by words claim and challenge the thing that is so out of his possession, or by *action* brought. Where any thing is wrongfully detained from any person, this claim is to be made; and the party making it may thereby avoid descents of lands or disseisins, and preserve his title, which otherwise would be in danger of being lost. 1 *Inst.* 250. See CONTINUAL CLAIM.

CLARENDON, constitutions of, were certain constitutions made in the reign of king *Henry* the Second, in a parliament holden at *Clarendon*; whereby the king checked the power of the pope and his clergy. 4 *Black.* 415.

CLARETUM, a liquor made of wine and honey, *clarified* or made clear by decoction, which the *Germans*, *French*, and *English* called *hippocras*: and it was from this, that the red wines of France were called *claret*. *Whart. Ang. Sax. Part 2. p.* 480.

CLAUSUM FREGIT signifies in law the same as an action of trespass, and is a writ so called because the defendant is summoned thereby to shew cause *quare clausum fregit*, that is, why he broke the close of the plaintiff. For every man's land is, in the eye of the law, inclosed and set apart from his neighbour's; and that, either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal boundary existing only in contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the

the writ itself specify one general damage, namely, the treading down and bruising his herbage. 3 *Black.* 209.

CLERGY are of two sorts, *regular* and *secular*. *Regular* are those that live under certain *rules*, being of some religious order, as abbots, priors, monks, or the like. The *secular* are those that live not under any certain rules of the religious orders, as bishops, deans, parsons, vicars.

The clergy being a body of men separate and set apart from the rest of the people, in order to attend to the divine offices, have thereupon had large privileges allowed them by our municipal laws; several of which have been lost by disuse, others abolished by act of parliament, but some do yet remain. Particularly, a clergyman cannot be compelled to serve on a jury; nor to appear at a court leet or frankpledge, which almost every other person is obliged to do. Neither can he be compelled to serve in any temporal office. During his attendance on divine service, he is privileged from arrests in civil causes. And, in cases of felony, he may have the benefit of his clergy, without being burnt in the hand. But the clergy are not exempt from the temporal burthens of repairing the highways, paying to the poor rate, and the like; and it seems to be now generally settled, that they are liable to all public charges imposed by act of parliament, where they are not specially excepted.

Benefit of clergy.—Anciently, princes and states, converted to christianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their persons from criminal proceedings, in some capital cases before secular judges; which was the true original of the benefit of clergy. Afterwards, the clergy increasing in wealth, power, honour, number, and interest, began to set up for themselves; and that which they obtained by the favour of princes and states at first, they now claimed as their right, and a right of the highest nature, namely, by the law of God; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministry relative to the church; and likewise in respect of the causes, exempting as far as they could all causes of clergymen,

gymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from *Christ*, and from the pope shed abroad into all subordinate and ecclesiastical jurisdiction. And by this means they endeavoured, and in some kingdoms and for some ages obtained, that there was a double supreme power in every kingdom; the one ecclesiastical, absolute, and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king, or civil magistrate. But this claim of exemption, although it obtained much in this kingdom; yet grew so burthensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom; for ecclesiastical canons never bound in *England* farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny. Also it was not allowed them in high treason. But, at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, lying in wait, and burning of houses (which were looked upon as hostile acts, and the authors of them therefore not intitled to the common privileges of subjects). 2 *Hale's Hist.* 323. 330.

And by the statute 25 *Ed. 3. st. 3. c. 4.* all manner of clerks, who shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall have the privilege of the holy church. By which statute, clergy is allowed in all treasons and felonies, except treason against the king; so that after this statute, the benefit of clergy might be pleaded and allowed in all other treasons and felonies. Consequently, wherever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. Consequently, where a new felony is made by an act of parliament, clergy is to be allowed, unless expressly taken away by such statute.

And

And if it maketh a new felony, and takes away clergy not generally, but in such or such cases, regularly in other cases clergy is allowable. But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents. *Id.*

By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verse) have been taken to have a right to this privilege, as much as persons in holy orders. 2 *Haw.* 338.

Persons admitted to the benefit of clergy are to be burned in the brawn of the left thumb; and, as a farther punishment, may be continued in prison for a year. Or, instead of being burnt in the hand, they may be transported for seven years. 18 *El. c.* 7. 4 *G. c.* 11.

A person admitted to his clergy forfeits all his goods that he hath at the time of the conviction. But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. Also, it restores him to his credit; and consequently enables him to be a good witness. And it is holden, that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *H. H.* 388. 2 *Haw.* 364.

CLERK, in its spiritual sense, denotes a person in holy orders: in its temporal acceptation, it signifies one who practises with his pen in any court, or otherwise.

CLERK OF ASSISE is he that writes all things judicially done by the justices of assize in their circuits. *Cramp. Jurisd.* 227.

CLERK OF THE MARKET is an officer incident to every fair and market, to punish misdemeanors therein; as a court of *pie poudre* is to determine all disputes relating to private or civil property. The object of his jurisdiction is principally the cognizance of weights and measures, to try whether they be according to the true standard; and if they be not, besides the punishment of the party by fine, the
weights

weights and measures themselves are to be burnt or otherwise destroyed.

CLERK OF THE PEACE is an officer attending upon the justices of the peace in sessions, appointed by the *custles rotulorum*. In the sessions where he is clerk of the peace, he shall not act as attorney or solicitor. 22 G. 2. c. 46. He shall certify into the king's bench the names of all persons outlawed, attainted, or convicted of felony. 34 & 35 H. 8. c. 14. He shall deliver to the sheriff, within twenty days after September 29, yearly, a schedule of all fines and other forfeitures in sessions; and on or before the second Monday after the morrow of *All Souls* shall deliver a duplicate thereof upon oath, into the court of exchequer. 22 & 23 C. 2. c. 22. 4 & 5 W. c. 24. If he misbehaves in his office, the justices in sessions may suspend or discharge him. 1 W. c. 21.

CLOSE, breaking of; words used in an action of trespass: for which see **CLAUSUM FREGIT**.

CLOSE ROLLS, or *close writs*; grants from the crown, to particular persons, and for particular purposes, and therefore not being intended for public inspection, are *closed* up and sealed on the outside, and thereupon called *writs close*; in contradistinction from grants relating to the public in general, which are therefore left open and not sealed up, and are called *litera patentes*, or *letters patent*. 2 Black. 346.

CLOSH was an unlawful game forbidden by some ancient statutes. It is said to have been the same as the modern nine-pins. In the statute 33 H. 8. c. 9. it is called *close-cayles*, which seems to intend throwing at the kittles or nine-pins; as to this day, in some parts of *England*, the throwing at cocks on *Shrove Tuesday* is called *cailing* of the cocks; so the children throwing at eggs about *Easter* is called *cailing* of eggs.

CLOUGH, a valley or hollow place between two mountains; a word not yet intirely out of use.

CLUNIAC monks were a reformed order of St. *Benedict*, who had their name from *Cluni* in *France*, where they settled about the year 912. They were brought into *England* in

in the time of *William* the Conqueror, and had their first house at *Leaves* in *Suffex*; and, at the time of the dissolution, they had twenty-seven houses here belonging to their order.

COACHES AND COACHMAKERS. By the 25 G. 3. c. 47. and the 29 G. 3. c. 49. several duties are imposed on persons keeping coaches and such like carriages, which are to be under the management of the commissioners of the window duties. And by the 25 G. 3. c. 49. every coach-maker shall take out a licence annually from the commissioners of excise; and by 27 G. 3. c. 13. a duty is also imposed on all *new coaches* and such like carriages made in *Great Britain*; for which see the acts and *Burn's Just.* title *Coaches*.

COALS :

1. By the 30 C. 2. c. 8. commissioners shall be appointed for the measuring and marking boats, wains, and carts, in the port of *Newcastle* and the members thereof; which shall be by the bowl-tub of *Newcastle*, containing twenty-two gallons and a pottle *Winchester* measure, and being of twenty-seven inches diameter upon the top, and allowing twenty-one bowls of coals by heap measure to each chaldron. And every wain shall be seven bowls, cart three bowls and a bushel heaped measure; and three wains or six carts shall be allowed for a chaldron; which said admeasurement, by the 6 & 7 W. c. 10. shall be by a dead weight of lead or iron (or otherwise), allowing fifty-three hundred weight to a chaldron. The weight of a wain load seventeen hundred weight and an half, cart load eight hundred weight and three quarters. And no keel or boat shall contain more than ten chaldrons.

2. By 16 & 17 C. 2. c. 2. sea-coal brought into the *Thames* shall be sold by the chaldron containing thirty-six bushels heaped up. All other coals, from *Scotland* or elsewhere, sold by weight, shall be sold after the proportion of 112 pounds to the hundred.

And the lord mayor and aldermen in *London* shall set the prices of coals to be sold by retail. And elsewhere, three justices shall set the rates of all sea-coal sold by retail in any part of *England*, allowing a competent profit to the retailers; and if the retailers refuse to sell accordingly, the justices may appoint persons to enter and sell the said coals at such rates as so set and ascertained. 32 G. 2. c. 27.

3. Any coal factor receiving, or coal owner giving, any gratuity, for buying or selling any particular sort of coals, or selling

selling one sort of coals for and as a sort which they really are not, shall forfeit 500*l.* 3 *G. 2. c. 26.*

4. For the admeasurement of sea-coals in the port of *London*, the coal bushel shall be made round, with a plain and even bottom, and shall be nineteen inches and an half from outside to outside, and shall contain one *Winchester* bushel and one quart of water; and all sea-coals sold by the said *Winchester* measure, shall be sold by the chaldre containing thirty-six of such bushels heaped up. 12 *An. R. 2. c. 17.*

5. Coals within the bills shall be carried in linen sacks sealed by the proper officer, which shall be at least four feet and four inches in length, and twenty-six inches in breadth: and sellers of coals by the chaldron or lesser quantity shall put three bushels of coals in each sack. 3 *G. 2. c. 26.* 32 *G. 2. c. 27.*

6. Wilfully and maliciously setting on fire any mine, pit, or delph of coal or cannel coal, is felony without benefit of clergy. 10 *G. 2. c. 32.*

7. If any person shall convey water into any coal work, with design to destroy or damage the same, he shall forfeit treble damages with costs. 13 *G. 2. c. 21.*

8. Setting fire to, demolishing, or otherwise damaging, any engine for draining water from coal mines, or for drawing coals out of the same; or any bridge, waggon way, or trunk, erected for conveying coals from any coal mine, or staith for depositing the same, is felony and transportation for seven years. 9 *G. 3. c. 29.*

COATS of arms were not in use till about the reign of king *Richard* the First, who brought them from the croisade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. 2 *Black. 306.*

COCKET, a seal belonging to the king's custom-house; or rather, a scroll of parchment sealed, and delivered by the officers of the customs to merchants, as a warrant that their merchandises are customed or have paid the king's duty.

COCOA NUTS. See COFFEE.

CODICIL,

CODICIL, *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator. 2 *Black.* 500.

In case of a real estate, a codicil cannot operate, unless it be executed according to the statute of frauds and perjuries. 1 *Atk.* 426.

But it is not necessary that the codicil be annexed to the will; it may be in a separate instrument; yet the will and codicil make both but one will. 1 *Vez.* 442.

COFFEE, TEA, CHOCOLATE, AND COCOA-NUTS.

By several statutes, regulations are made respecting the importation and management thereof, which are to be under the inspection of the officers of the customs and excise.

And by the 27 *G. 3. c. 13.* all former duties of customs and excise thereon, are repealed, and new duties imposed in lieu thereof, as set forth in schedules annexed to the said act.

COGNISANCE, or *cognizance* (Fr. *connaissance*; Lat. *cognitio*), is used diversly in our law. Sometimes it is an acknowledgment of a fine, or confession of a thing done. So there is a cognizance of taking a distress. Sometimes it is the hearing of a matter judicially, as to take cognizance of a cause. And sometimes it is a jurisdiction, as cognizance of pleas is a power to call a cause or plea out of another court. This cognizance of pleas is a privilege granted by the king to a city or town, to hold pleas within the same; and when any one is impleaded in the courts at *Westminster*, the owner of the franchise may demand cognizance of the plea: but if the courts at *Westminster* be possessed of the plea before cognizance be demanded, it is then too late. *Terms of the Law.*

There are three sorts of inferior jurisdictions: one thereof is to *hold pleas*, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the king's courts, if he will. The second, is a *cognizance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person that can take advantage of it; for the defendant cannot plead this to the jurisdiction of the court, but the lord must come in and claim his franchise. The third sort is an *exempt jurisdiction*;

as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere, this grant may be pleaded to the jurisdiction of the king's court, if there be a court within that city which can hold plea of the cause; and no person can take advantage of this plea but the defendant. 3 *Salk.* 79.

But cognizance must be demanded before full defence is made, or imparlance prayed: for these are a submission to the jurisdiction of the superior court. And it will not be allowed if it occasions a failure of justice, or if an action be brought against the person himself who claims the franchise, unless he hath a power in such case to make another judge. 3 *Black.* 298.

Cognizance of a distress is, where a person hath taken a distress, and is impleaded for the same; whereupon, if he took the distress in his own right, he avows the taking of it, as for rent in arrear or other cause, and this is called an *avowry*: but if he justifies in the right of another, as his bailiff or servant, he is then said to make *cognizance*, that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distress. 3 *Black.* 149.

Cognizance signifies also the *badge* of a waterman or servant, which is usually the giver's crest, whereby he is known to belong to this or that nobleman or gentleman.

COIF, a title given to serjeants at law, who are called serjeants of the coif, from the lawn coif they wear on their heads under their caps, when they are created. The use of it was anciently to cover the clerical tonsure, otherwise called *corona clericalis*; because the crown of the head was close shaved, and a border of hair left round the lower part, which made it look like a crown.

COIN:

1. Coin, in *French*, signifies a *corner*, and from thence hath its name (according to lord *Coke*) because in ancient times money was square, with corners, as it is in some countries to this day. 1 *Inst.* 207.

2. By various statutes, there are many offences relating to the coin; which may be reduced into the following order:

Counterfeiting the king's money, or bringing false money into the realm counterfeited to the money of *England*; clipping, washing, rounding, filing, impairing, diminishing, falsifying,

ing, scalling, lightening, edging, colouring, gilding, making, mending, or having in one's possession, any puncheon, counterpuncheon, matrix, stamp, dye, pattern, mould, edger, or cutting engine: all these incur the penalty of high treason.

And if any person shall counterfeit any such kind of coin of gold or silver, as are not the proper coin of this realm, but current therein by the king's consent, he shall be guilty of high treason.

And if any person shall tender in payment any counterfeit coin, he shall, for the first offence, be imprisoned six months; for the second offence, two years; and for the third offence shall be guilty of felony without benefit of clergy.

Blanching copper or other base metal, or buying or selling the same; and receiving or paying money at a lower rate than its denomination doth import; and also the offence of counterfeiting copper halfpence and farthings; incur the penalty of felony, but within clergy.

Counterfeiting coin, not the proper coin of this realm, nor permitted to be current therein, is misprision of treason.

A person buying, or selling, or having in his possession clippings or filings, shall forfeit 500 *l.* and be branded in the cheek with the letter R.

Any person having in his possession a coining press, or casting bars or ingots of silver in imitation of *Spanish* bars or ingots, shall forfeit 500 *l.*

Buying or selling bullion or molten silver, by any but a goldsmith or refiner, is six months imprisonment.

3. Any person to whom any money shall be tendered, any piece whereof shall be diminished otherwise than by reasonable wearing, or that he shall suspect to be counterfeit, may cut or deface the same: and if it shall appear so to be diminished or counterfeit, the person tendering the same shall bear the loss: if otherwise, he who cut or defaced the same shall receive it at the rate it was coined for. And if any question shall arise concerning it, the same shall be determined by the mayor or other head officer in a corporation, and elsewhere by a neighbouring justice. 9 & 10 *W. c.* 21.

13 *G.* 3. *cap.* 77.

4. A reward of 40 *l.* is given for convicting a counterfeiter of the gold or silver coin; and 10 *l.* for a counterfeiter of the copper coin. 6 & 7 *W. c.* 17. 15 & 16 *G.* 2. *c.* 23.

5. No person can be enforced to take in payment any money but of gold or silver; except for sums under 6 *d.* 2 *Inst.* 577.

COLLATERAL, from the Latin *laterale*, sideways, or that which hangeth by the side, not direct. As collateral *assurance* is that which is made over and above the deed itself; collateral *security* is where a deed is made of other lands besides those granted by the deed of mortgage. If a man covenants with another and enters into bond for performance of his covenant, the bond is collateral to the covenant, because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings in a fair or market in another man's ground, it is collateral to the ground. The private woods of a common person, within a forest, may not be cut down without the king's licence; it being a prerogative collateral to the soil. And to be subject to the feeding of the king's deer is collateral to the herbage of the forest. *Crompt. Jurisd.* 185. *Manw.* 66.

Collateral *warranty*, is where the heir's title to the land is not derived from the warranting ancestor; as where a younger brother releases to a disseisor his father's land with warranty, this is collateral to the elder brother. 2 *Black.* 301.

Collateral *issue*, is where a criminal attainted pleads some collateral matter in bar of execution, as the king's pardon, an act of grace, or diversity of person; namely, that he is not the same person that was attainted; which last is only, when some considerable time hath intervened between the attainder and the award of execution, in which a jury shall be impanelled to try this collateral issue; namely, the identity of his person; and not whether guilty or innocent, for that has been decided before. 4 *Black.* 396.

Collateral *kindred*, are such as lineally spring from one and the same ancestor, but differ in this that they do not descend one from the other. As if a man hath two sons, who have each a numerous issue; both these issues are lineally descended from the same grandfather as their common ancestor, and are collateral kindred to each other, all having a portion of the blood of their common ancestor, and are therefore denominated *consanguinei*. 2 *Black.* 204.

Collateral *descent*, is derived from the side of the *lineal*, as grandfather's brother, father's brother, and the like. As if a man purchase lands in fee simple, and dies without issue; for default of a lineal heir, he who is next of kin in the collateral line of the whole blood, though never so remote, comes in by descent as heir to him. 1 *Inst.* 10.

COLLATIO BONORUM is, where a portion, or money advanced by the father in his life-time to a son or daughter, is brought into hotchpot, in order to have an equal distribution of the personal estate in case of his dying intestate. And this is in pursuance of the statute 22 & 23 C. 2. c. 10.

COLLATION to a benefice is, where the bishop and patron are one and the same person; in which case the bishop cannot present to himself, but he doth, by the one act of *collation* or *conferring* the benefice, the whole that is done in common cases by both presentation and institution.

COLLEGES in the universities are generally lay corporations, although the members of the college may be all ecclesiastical. 2 *Salk.* 672.

And in the government thereof, the king's courts cannot interfere, where a visitor is specially appointed: for from him, and him only, the party grieved ought to have redress; the founder having reposed in him so intire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. 1 *Black.* 483.

But where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice. *Id.* 484.

The two universities, in exclusion of the king's courts, enjoy the sole jurisdiction over all civil actions and suits; except in such cases where the right of freehold is concerned. 3 *Black.* 83.

Their proceedings are in a summary way, according to the practice of the civil law. *Wood. b. 4. c. 2.*

An appeal lies from the chancellor's court to the congregation, thence to the convocation, and from thence to the delegates. *Id.*

But they have no jurisdiction unless the plaintiff or defendant is a scholar, or servant of the university, or of some college; but if either of them is a scholar, it is then a matter within their jurisdiction; but yet, if either of them is entered into a college by collusion, to avoid a suit in the king's courts, or to excuse himself from town offices, his privilege shall not be allowed.

And in order to be intitled to this privilege, it must appear, that the person claiming it is resident in the university at that time.

Also they have jurisdiction in criminal offences or misdemeanors, under the degree of treason, felony, or maim.

COMBAT, was a formal trial between two champions, of a doubtful cause or quarrel. See **BATTEL**.

COMBINATIONS amongst victuallers or artificers to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and in general, by the 2 & 3 *Ed. 6. c. 15.* with the forfeiture of 10*l.* or twenty days imprisonment, with an allowance only of bread and water, for the first offence; 20*l.*, or the pillory, for the second; and 40*l.* for the third, or else the pillory, loss of an ear, and perpetual infamy.

COMBUSTIO DOMORUM, burning of houses, anciently called *arsen*, was by the common law denied the benefit of clergy, when all other felonies were intitled to it, except *insidiatio viarum*, or lying in wait for one on the highway, and *depopulatio agrorum*, or destroying and ravaging a country; which three offences were excluded from the benefit of clergy, as they were a kind of hostile acts, and in some degree bordered upon treason. 4 *Black. 372.*

COMBUSTIO PECUNIÆ was the ancient way of trying mixed and corrupt money, by melting it down, upon payments into the exchequer. In the time of king *Hen. 2.* a constitution was made called the trial by combustion, the practice whereof differed little or nothing from the present method of assaying silver. *Lovvades on coin, 5.*

COMMAND. A wife shall not be excused the committing of any crime by the command of her husband; nor shall a servant be excused the committing a crime by the command of his master. 1 *Haw. 3.*

At the command of the constable, all persons of ability within his constablewick are bound to assist him in suppressing a riot or an affray, and in keeping the king's peace: and if they disobey his command, they are punishable by fine and imprisonment. 1 *Haw. 137.*

COMMANDRIES were manors or estates belonging to the Knights Hospitalers, otherwise called the knights of *St. John of Jerusalem*, where, erecting churches for the service of God, and convenient houses, they placed some of their fraternity under the government of a *commander*, who were allowed proper maintenance out of the revenues under their care, and accounted for the remainder to the grand prior

prior at *London*: so *New Eagle*, in *Lincolnshire*, is still called the *commandry of Eagle*. Where such estates belonged to the Knights Templars, the person who presided over them was usually one of those who had by the grand master been created *praeceptores templi*, from whence those estates were styled *praeceptories*. They were only cells to the principal house at *London*.

COMMENDAM, is a benefice or ecclesiastical living, which being void, or to prevent its becoming void, *commendatur*, is committed, to the charge and care of some sufficient clerk, to be supplied until it may conveniently be provided of a pastor. Thus when a parson of a parish is made the bishop of a diocese, there is a cession of his benefice by the promotion: but if the king gives him power to retain his benefice, he shall continue parson thereof, and shall be said to hold it *in commendam*. A *commendam* may be temporary, for one, two, or three years; or perpetual, by a kind of dispensation to avoid a vacancy of the living, and is called a *commendam retinere*. There is also a *commendam capere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him, as institution and induction are to another clerk. 1 *Black.* 393.

COMMISSARY, is he that is limited by the bishop to some certain part of the diocese; and in most cases has the authority of official principal and vicar general within his limits.

COMMISSION, is taken for the warrant or appointment whereby one or more persons have the charge of any matter committed to them. The *judges* by their commission have power to hear and determine causes. And most of the great officers, judicial and ministerial, of this realm are made by commission. Anciently there was a commission of *anticipation*, to collect a tax or subsidy before the day. Commission of *array* was to muster and array, or set in order, all the men able to bear arms in such a district. Commission of *association*, is to associate certain learned persons with the judges in their circuits. Commission of *bankruptcy*, is a commission issued out of chancery to certain commissioners appointed to take order with the bankrupt's estate for the satisfaction of his creditors. Commission of *charitable uses*, issues

out of chancery to divers persons, where lands given to charitable uses are misemployed, or there is any fraud or abuse of the charity, in order to rectify such abuse. Commission of *delegates*, is granted in case of appeal to the king in chancery, directed to certain persons skilled in the ecclesiastical and temporal laws, to determine the matter in issue. Commission of *lunacy*, is a commission out of chancery to inquire whether a person represented to be lunatic, be so or not; that if so, the king may commit the care of him and of his estate to some friend, who in such case is called the committee. Commission of *rebellion*, otherwise called a *writ* of rebellion, issues, where a man, after proclamation made by the sheriff upon a process out of chancery to present himself to the court by a day assigned, makes default in appearance; and this is directed to certain persons to apprehend the party as a *rebel* and contemner of the laws, and bring him to the court on a day therein assigned. It issues after an attachment and a *non inventus* returned thereon. Commission of *sewers*, is directed to certain persons to cause drains and ditches to be well kept and maintained in marshy and fenny grounds, for the better conveyance of the water, and preservation of the land.

COMMISSIONER, is he that hath a commission, or other lawful warrant, to examine any matters, or to execute any public office. Commissioners must pursue the authority of their commission, otherwise their acts will be void. For their office is to do what they are commanded, and herein it is necessarily implied, that they may do that also without which what is commanded cannot be done. If their authority is appointed by any statute law, they must execute it as the statute prescribes. If a commission is given to commissioners to execute a thing against law, they are bound not to accept or obey it.—Besides commissioners relating to judicial proceedings, there are commissioners of the treasury, of the navy, of the customs, of the excise, and many others.

COMMITMENT, is sending of a person to prison, by warrant or order, who is charged with any crime. And it may be, by the judges, justices of the peace, or other magistrates, who have authority for the same by the laws and statutes of this realm.

It must be in *writing*, either in the name of the king, and only tested by the person who makes it; or it may be made
by

by such person in his own name, expressing his office or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

It should contain the *name* of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, or the like, and to add that he refuseth to tell his name. 1 *H. H.* 577.

It ought to contain the *cause*, and the certainty thereof; as if it be for felony, it must contain the special nature of the felony, as felony for the death of such a man; if for burglary, then to say for burglary in breaking the house of such a one: and, therefore, a commitment to answer such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

It must have an apt *conclusion*; as, where a man is committed as a criminal, it must be until he be discharged by due course of law; if for contumacy, then until he comply and perform the thing required. 2 *Haw.* 120.

It must be under *seal*; unless it be by some court of record, for there the record itself, or a memorial thereof, are a sufficient warrant without any warrant under seal. 1 *H. H.* 584.

COMMON :

1. *Common, what.*
2. *Origin of the right of common.*
3. *Of common appendant.*
4. *Common appurtenant.*
5. *Common by reason of vicinage.*
6. *Common in gross.*
7. *Common of estovers.*
8. *Common of fishery.*
9. *Common of turbary, and other digging the soil.*
10. *Disturbance of common by one who has no right.*
11. *Disturbance of common by uncommonable goods.*
12. *Disturbance of common by surcharging.*
13. *Disturbance by inclosure, or other obstruction.*
14. *Of the lord's right to inclose the surplus.*

1. *Common, what.*

COMMON, is a profit which a man hath in the lands of another. And it is called *common*, because it is common to many. 1 *Inst.* 122.

2. *Origin of the Right of Common.*

When a lord of a manor (wherein was great waste ground) did infeoff others of some parcels of arable land, it was necessary that the feoffee should have common in the wastes, or otherwise, as incident to the feoffment. And this was permitted, not only for the encouragement of agriculture, but from the necessity of the thing. For a man could not plow or manure his grounds without beasts; and they could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and in the uninclosed fallow grounds of himself and the other tenants. The lord therefore annexed this right of common, as inseparably incident to the grant of the lands. 2 *Inst.* 85, 6. 2 *Black.* 33.

3. *Of Common Appendant.*

COMMON APPENDANT, is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. And for this a man need not prescribe, because he hath it of common right. 1 *Inst.* 122.

But he shall not use the land with hogs, goats, geese, or the like; for these are not necessary to plow the land, or to manure it. 1 *Roll's Abr.* 397.

Common appendant ought to be appendant to *arable* land, that is, which is capable of being made arable; and not to any land not arable, nor to an house. *Ibid.*

A cottager may prescribe to have common for all beasts levant and couchant as appendant to his cottage. For a cottage contains a curtilage at least; and a cottage by the statute ought to have four acres of land to it. And it hath been holden, that foddering cattle in the yard is an evidence of levancy and couchancy. 1 *Salk.* 169.

If common appendant be claimed to a *manor*, yet in reality it is appendant to the *demesnes*, and not to the *services*; and therefore, if a tenancy *escheat*, the lord shall not increase his common by reason thereof. 1 *Inst.* 122.

If the lord *infranchises* a copyholder's estate, the right of common which he had before as a customary tenant is gone, and cannot be restored but by special words in the *infranchisement*, and not by the common words *with the appurtenances*. But a grant of *all commons* usually occupied with
the

the tenement, will pass such common as the first was. *Cro. Jac.* 253. *Mo.* 467.

He that hath common appendant, can keep but a number of cattle proportionable to his land; for he can common with no more than the lands to which his common belongs are able to maintain. 3 *Salk.* 93.

And, generally, so many cattle as the land to which the common is appendant, can maintain in the winter, so many shall be said levant and couchant. *Noy*, 30. 2 *Brownl.* 101.

Generally, the commoner cannot use the common but with his own proper cattle; but if he hath not any cattle to manure the land, he may borrow other cattle to manure it, and may use the common with them; for by the loan, they are in a manner made his own cattle for the time. 1 *Roll's Abr.* 398. Also, the lord may license a stranger to put in his cattle, if he leaves sufficient room for the commoners besides. 1 *Roll's Abr.* 396.

He who has common appendant to one acre of land, shall not use this common but with beasts that are levant and couchant upon the same acre. *Br. Common*, pl. 8.

Common appendant may be, to common after the corn is severed till it is sown again. So it may be to common in the meadow ground after the hay is carried off till Candlemas. So it may be to common from the feast of *St. Augustine* to *All Saints*, and the like. 1 *Roll's Abr.* 397.

If all the inhabitants of a town prescribe to have common in such a field after harvest, and one particular man, who hath land within the said field sowed, will not within convenient time gather in his corn, but suffer the same to continue there on purpose to bar the inhabitants of their common; they may put in their cattle, and if they eat his corn he hath no remedy. 2 *Leon.* 202.

Where the inhabitants of one parish have common appendant in certain waste grounds in another parish, they shall pay taxes where the estate lies; for it is to be considered as part of the estate, and the estate to be taxed higher upon that account. 1 *Salk.* 169.

4. *Common Appurtenant.*

COMMON APPURTENANT is, where the owner of land hath right to put in other goods besides such as are generally commonable, as hogs, goats, geese, and the like. This, not arising from the necessity of the thing, like common appendant, is therefore not of common right, but can only

only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. 2 *Black.* 33.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of common *appurtenant*, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant. 1 *Inst.* 122.

Common appurtenant may be to a house, meadow, pasture, as well as to arable land, and ought to be prescribed for by special words, as being against common right, and it may be severed from the land to which it is appurtenant. *Wood. b. 2. c. 2. f. 6.*

If a man grants common appurtenant to such a close, it is good, and shall pass by grant of the close; for common appurtenant may be created at this day. 2 *Sid.* 87.

Burgagers in a borough may have common appurtenant to their burgages by prescription. 2 *Sid.* 462.

5. *Common by reason of Vicinage.*

Common because of VICINAGE, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another, the beasts of the one straying mutually into the other's grounds, without any molestation from either. This is, indeed, only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one township a right to put his beasts originally into the other's common, for then they are distrainable; but if they escape, and stray thither of themselves, the law winks at the trespass. 2 *Black.* 33.

And the inhabitants of one vill shall not put in more beasts, but having regard to the estates of the inhabitants of the other vill. *Br. Common, pl. 55.*

6. *Common in Gross.*

Common IN GROSS, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person,

person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by the parson of a church, or the like corporation sole. This is a separate inheritance, intirely distinct from any landed property, and may be vested in one who hath not a foot of ground in the manor. 2 *Black.* 34.

Of common appendant, appurtenant, and in gros, some are certain, that is, for a certain number of beasts; some certain by consequence, namely, for such as are levant and couchant upon the land; and some are more uncertain, as common without number in gros; and yet the tenant of the land must common or feed there also. 1 *Inst.* 122.

If a man prescribes for common appurtenant for a certain number of cattle, it is not necessary, nor material, to shew that they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained. *L. Raym.* 726. 1015.

7. Common of Estovers.

Common of ESTOVERS (from the French *estoffer*, to furnish) is a liberty of taking necessary wood for the use or furniture of a house or farm, from off another's estate. The Saxon word *bote* is of the same signification with the French *estovers*, and therefore *housebote* is a sufficient allowance of wood, to repair or to burn in the house, which latter is sometimes called *firebote*; *ploughbote* and *cartbote* are wood to be employed in making and repairing all instruments of husbandry; and *haybote* or *hedgebote* is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable; and such, any tenant for life or for years may take from off the land let or demised to him, as incident to his estate, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. 1 *Inst.* 41. 2 *Black.* 35.

8. Common of Fishery.

Common of FISHERY is, a liberty of fishing in another man's water. 2 *Black.* 34.

If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded from having pasture, estovers, or the like; this is a prescription or custom against law, to exclude the owner of the soil; for it is against the nature of the word *common*,
and

and it was implied in the first grant that the owner of the soil should take his reasonable profit there. But a man may prescribe or allege a custom to have and enjoy the sole feeding of the land from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separate* pasture, and exclude the owner of the soil from feeding there. So a man may prescribe to have a *separate* fishery in such a water, and the owner of the soil shall not fish there; but if he claim to have *common* of fishery, or a *free* fishery, the owner of the soil shall fish there. 1 *Inst.* 122.

9. *Common of Turbary, and other Digging the Soil.*

Common of TURBARY is a liberty of digging turf upon another man's ground. There is also a common of digging *stones, coals, minerals*, and such like. 2 *Black.* 34.

Common of turbary cannot be appendant to land, but only to an house. 1 *Roll's Abr.* 397.

If on an action of trespass the defendant justifies, that he and his ancestors, and all whose estate he hath in a certain house, have used time out of mind to have common of turbary to dig and sell at their pleasure, as belonging to the house; this plea is bad, and repugnant in itself; for turbary, appertaining to an house, ought to be spent in the house, and not sold abroad. *Noy*, 145.

New erected *cottages*, though they have four acres of ground laid to them, ought not to have common of turbary in the waste. 2 *Inst.* 740.

Where turf is taken away from the common, the lord only can bring his action; but, it is said, the commoners may have an action for the trespass by entering on the common, whereby their herbage is made worse. 1 *Roll's Abr.* 89. 398.

10. *Disturbance of Common, by one who has no right.*

Where one, who hath no right of common, puts his cattle into the land, and thereby deprives the cattle of the commoners of their respective shares of the pasture, the lord, or any of the commoners, may distrain them damage feasant; or, a commoner may bring an action upon the case to recover damages, provided the injury done be any thing considerable, so as that he may lay his action that thereby he was deprived of his common. But for a trivial trespass, the

the commoner hath no action; but the lord of the soil only, for the entry and trespass committed. 3 *Black.* 237.

If a man, that has no right, comes and cuts fern upon the common, and by burning the same converts it to his own use, a commoner, cannot justify dispersing the ashes, but may bring his action. *Str.* 777.

11. *Disturbance of Common by Uncommonable Goods.*

Where one, who hath a right of common, puts in cattle that are not commonable, as hogs and goats, the lord or any of the commoners, as is aforesaid, may distrain them damage feasant, or (if the damages be considerable) a commoner may bring his action. But the lord of the soil, by custom or prescription, but not without, may put uncommonable cattle upon the common. 3 *Black.* 237.

12. *Disturbance of Common by furcharging.*

Disturbance of common by furcharging is, where more cattle are put on the common than the pasture or herbage will sustain, or the party hath a right to do. This injury by furcharging can, properly speaking, only happen when the common is appendant or appurtenant, and of course limited by law; or where, when in gross, it is expressly limited and certain: for where a man hath common in gross, without number or without stint, he cannot be a furcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts; for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself. 3 *Black.* 237.

The usual remedies for furcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or by a special action on the case for damages, in which any commoner may be plaintiff. But the ancient and most effectual method of proceeding is, by *writ of admeasurement of pasture*; which is executed by a jury, who upon their oaths are to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is intitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed. And if, after this admeasure-

C O M

ment, the same defendant furcharges the common again, the plaintiff may have a writ of second furcharge; and if it is found that he hath again furcharged, he shall forfeit to the king the supernumerary cattle put in, and shall also pay damages to the plaintiff. 3 *Black.* 238.

If the lord furcharges the common, a commoner may not drive his cattle off the common, or distrain them damage feasant, as he may the cattle of a stranger; but the remedy against the lord is either an assize, or an action on the case. *F. N. B.* 125. *Burr. Mansf.* 2426.

A custom of a manor, for the reeve to make a drift of the cattle at any time by the appointment of the steward, is good, and is more reasonable than a custom to drive the common at a certain time; because, if that were the custom, the commoners would furcharge the common all the rest of the year, except at those times. *L. Raym.* 1186.

13. *Disturbance by Inclosure, or other Obstruction.*

Disturbance of common by inclosure or other obstruction is, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law intitled. This may be done, either by erecting fences, or by driving the cattle off the land, or by plowing up the soil of the common: or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and hath given him his remedy by action against the owner. 3 *Black.* 240.

A commoner, without a special custom, may not cut bushes, dig trenches, or get clay upon the common, for this destroys the grass, and carrying it away doth damage to the ground, so that the other commoners cannot enjoy the common in as ample manner as they ought to do. *Godb.* 334.

14. *Of the Lord's Right to inclose the Surplus.*

If any commoner incloses, or builds on the common, every commoner may have an action for the damage. 1 *Roll's Abr.* 398.

And if the lord incloses on the common, and leaves not common sufficient, the commoners may not only break down

down the inclosure, but may put in their cattle, although the lord plows and sows the land. 2 *Inst.* 88.

But by the statute of *Merton*, 20 *H.* 3. c. 4. the lord may approve (which is an old word, and signifies the same as *improve*), that is, may inclose and convert to the uses of husbandry any waste grounds, in which his tenants have common appendant, provided he leaves sufficient common to his tenants, according to the proportion of their land. And the statute of 13 *Ed.* 1. c. 46. extends this liberty of approving, in like manner, against all others that have common appurtenant or in gross.

Which said statute of 20 *H.* 3. c. 4. is as follows: *Because many great men, which have infeoffed knights and their freeholders of small tenements in their great manors, have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture, as much as belongeth to their tenements, it is provided, that whensoever such feoffees do bring an assize of novel disseisin for their common of pasture, and it is knowledged before the justicers that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture, then let them be contented therewith: and they on whom it was complained shall go quit of as much as they have made their profit of their lands, wastes, woods, and pastures: but if they allege, that they have not sufficient pasture, or sufficient ingress and egress according to their hold, then let the truth be inquired of by assize; and if it be found by the assize, that the same deforceors have disturbed them of their ingress and egress, or that they had not sufficient pasture as aforesaid, then they shall recover their seisin by view of the inquest: so that by their discretion and oath, the plaintiffs shall have sufficient pasture, and sufficient ingress and egress in form aforesaid, and the disseisors shall be amerced and shall yield damages.*

The approvement must be made and divided by some inclosure or defence; for it is lawful for the tenant to put his cattle into the residue of the common, and if they stray into that part whereof the approvement is made, in default of inclosure, he is no trespasser. 2 *Inst.* 87.

And if the lord doth inclose part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common. 2 *Inst.* 88.

If the lord make a feoffment of certain acres, the feoffee may

may inclose, because the feoffment is an approvement in its nature. 2 *Inst.* 87.

If a man incloses where by law he may, he is bound to leave a good way, and also to keep it in repair continually at his own charge. *Jo.* 296. 8. *Car. Henni's case.*

COMMON, tenants in.

TENANTS IN COMMON, are they that have lands or tenements in fee simple, fee tail, or for term of years, or any other fixed estate, and they have such lands or tenements by several titles, and not by joint title, and none of them knoweth of this his several, but they ought not by the law to occupy these lands or tenements in common, and *proindiviso*, to take the profits in common. *Litt. sect.* 292.

And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are therefore called tenants in common. *Ibid.*

Parceners are only by descent, jointenants are only by purchase, and tenants in common are by descent, purchase, or prescription. 1 *Inst.* 188.

An estate given to two persons *equally to be divided* between them, though in *deeds* it hath been said to be a joint tenancy, yet in *wills* it is a tenancy in common. This nicety in the wording of grants makes it the most usual, as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to hold as tenants in common, and not as jointenants. 2 *Black.* 193.

As they take by distinct moieties, and have no intirety of interest, therefore there is no survivorship between tenants in common. 2 *Black.* 194.

If tenants in common be disseised, they must have several actions, and not one joint action; and the reason is, for that they were seised by several titles. But otherwise it is of jointenants; for if there be twenty jointenants, and they be disseised, they shall have in all their names but one action, because they have only one joint title. *Litt. sect.* 311.

But as to actions personal, tenants in common may have such actions personal jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes, feeding, waisting, and destroying their grass, cutting their
woods,

woods, fishing in their piscary, and such like. In this case, they shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty. *Litt. sect. 315.*

Tenants in common, like as jointenants, are compellable to make partition. 2 *Black.* 194.

COMMON LAW is so called, as it is the common municipal law, or rule of justice, throughout the kingdom. For although there are divers particular laws, some by custom applied to particular places, and some to particular causes, yet that law, which is common to the generality of persons, things, and causes, and hath a superintendency over those particular laws that are admitted in relation to particular places or matters, is the common law of *England*.

It is distinguished from the *statute* law, or acts of parliament, as having been the law of the land, before any acts of parliament that are now extant were made, though possibly a considerable part of it might have been acts of parliament in ancient time, which are now lost: for there are no acts of parliament now ancients than the reign of king *Henry* the third.

This common law is delivered down to us in the writings of divers learned men, such as *Glanvil*, *Bracton*, *Briton*, the author of *Fleta*, and above all Sir *Edward Coke*, whose works may justly be stiled the grand repository of the common law.

COMMON PLEAS is one of the king's courts of record at *Westminster*, frequently termed in law the *common bench*. By the ancient Saxon constitution, there was only one superior court of justice in the kingdom, and that had cognizance both of civil and spiritual causes; namely, the *wittena gemot*, or general council, which assembled annually or oftener, and attended the king wherever he resided, as well to do private justice, as to consult upon public business. At the conquest, the ecclesiastical jurisdiction was separated from the temporal; and of the temporal judges, the Conqueror separated their deliberative power as counsellors to the crown, from their ministerial power as judges. Of those who constantly attended him as judges, he established a regular court in his own hall, thence called by ancient authors *aula regia*, or *aula regis*. And these were bound to follow the king's household in all his progresses and expeditions; which being found very inconvenient to the subject, it was afterwards established

by *magna charta*, that common pleas should not follow the king's court, but be holden in some place certain. Which place certain was appointed to be in *Westminster-hall*, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And this jurisdiction became afterwards subdivided and broken into several distinct courts of judicature, and the distribution of justice was thrown into so provident an order, that the judicial officers were made to form a cheque upon each other; the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to the other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanors wherein the king (on behalf of the public) is plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the court of king's bench, the latter of the court of common pleas; and in this court only can *real* actions, that is, actions which concern the right of freehold or the *realty*, be originally brought; and in this court also, all other, or *personal*, pleas between man and man, are determined; but in some of these the king's bench hath a concurrent authority. But a writ of error, in the nature of an appeal, lies from the court of common pleas to the court of king's bench. 3 *Black.* 37.

This court can hear and determine causes removed out of inferior courts by *pone*, *recordare*, or other like writs. They can also grant prohibitions to keep other courts, as well ecclesiastical as temporal, within due bounds.

COMPOSITION REAL, for tithes, is, where the incumbent of any church, together with the patron and ordinary, do agree by deed under their hands and seals, or by fine in the king's court, that certain lands shall be freed and discharged of the payment of tithes for ever, paying some annual payment, or doing some other thing, to the benefit of the parson or vicar to whom the tithes did belong. And from these real compositions it is presumed, that all prescriptions *de modo decimandi*

decimandi took their first rise and beginning; but it is more probable, that most of them at this day have grown from the negligence and carelessness of the clergy themselves. *Degge, p. 2. c. 20.*

COMPURGATOR, was one who made oath, together with the defendant, of the defendant's innocence with respect to the matter charged against him. This practice was frequent in the ecclesiastical courts; and in the temporal courts it is still essential in what is called waging of law; in which case the defendant makes oath of the truth of his allegation, and brings a certain number of others who avow, upon their oaths, that they believe what he saith is true.

CONCORD, is a supposed *agreement* between the parties in levying a fine of lands, in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of the complainant; which acknowledgment is made before one of the judges of the court, or before commissioners in the country, and is entered in this form: " And the agreement is such, to wit, " that the aforesaid *A. B.* hath acknowledged the aforesaid " tenements, with the appurtenances, to be the right of him " the said *C. D.* as those which the said *C. D.* hath of the " gift of the said *A. B.* and those he hath remised and quit- " ted claim from him and his heirs to the aforesaid *C. D.* " and his heirs for ever." 2 *Black.* 350.

CONDITION:

ESTATES which men have in lands or tenements upon **CONDITION**, are of two sorts; either upon Condition *in deed*, or upon Condition *in law*.

Condition *in deed* is, as if a man, by deed indented, enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts, on condition, that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter into the same lands or tenements; or if it happen the rent be behind by a week, or a month, or half a year, after any day of payment of it, that then it shall be lawful to the feoffor and his heirs to enter: in these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprized in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and oust the feoffee thereof quite, and have and hold the same in his former

estate. And it is called an estate *upon condition*, because that the estate of the feoffee is defeasible, if the condition be not performed. In the same manner it is, if lands be given in tail, or let for term of life or years upon condition. *Litt.* 325, 326.

But where a feoffment is made of certain lands, reserving a certain rent, upon such condition, that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied of the rent behind; in this case, if the rent be behind, and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind, and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. *Litt.* 327.

There are divers words (amongst others) which of themselves make estates upon condition; one is the word *condition*, as if A. infeoff B. of certain land, to have and to hold to the said B. and his heirs, *upon condition* that the said B. and his heirs do pay or cause to be paid to the aforesaid A. and his heirs yearly such a rent; in this case, without any more saying, the feoffee hath an estate upon condition. *Litt.* 328.

Also, if the words were such, *provided always*, that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent; or these, *so that* the said B. do pay or cause to be paid to the said A. such a rent: in these cases, without more saying, the feoffee hath but an estate upon condition; so as if he doth not perform the condition, the feoffor and his heirs may enter. *Litt.* 329.

Also there are other words in a deed which cause the tenements to be conditional; as if upon such feoffment a rent be reserved to the feoffor and his heirs, and afterward these words are put into the deed, that if it happen the aforesaid rent be behind in part or in whole, it shall then be lawful for the feoffor and his heirs to enter; this is a deed upon condition. *Litt.* 330.

Estates which men have upon condition *in law*, are such estates which have a condition by the law to them annexed, although it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life; the estate which he hath in the office is upon condition in law, namely, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth; or

or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will. And such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing. *Litt.* 378.

Also estates of lands or tenements may be made upon condition in law, although upon the estate made there was not any mention or rehearsal made of this condition. As if a lease be made to the husband and wife, to have and to hold to them during the coverture between them; in this case they have an estate for term of their lives upon condition in law; that is, if any of them die, or that there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter. *Litt.* 380.

If the condition of a bond be, to pay money by instalments, the bond becomes forfeited on failure of the first payment: for in this case there is a difference between an *action of debt* upon a bond, and an *action on a contract* for paying several sums at several times. 1 *Wilson*, 80. 1 *Inst.* 292.

CONFEDERACY is, when two or more combine together to do any damage or injury to another, or to do any unlawful act. And in some cases it is punishable, though nothing be put in execution. But to render it punishable before it is executed, it ought to have these incidents: 1. It must be declared by some matter of prosecution, as by making of bonds or promises one to another. 2. It should be malicious, as for unjust revenge. 3. It ought to be false, against an innocent person. 4. It is to be out of court voluntarily. *Terms of the Law.*

CONFESSION is, where a prisoner being arraigned for an offence, and being asked whether he is guilty or not guilty, confesses the crime with which he is charged; which is the highest conviction that can be. But it is usual for the court, especially if it be for a capital offence, to advise the party to plead, and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

Besides the *express* confession, there is also an *implied* confession, in inferior offences that do not amount to felony, whereby the party doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court

may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

There is also another species of confession, which is called an *approvement*. And that is, when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before any plea pleaded; and accuseth others his accomplices of the same crime, in order to obtain his pardon. But this course hath been long disused. And in many cases, by several acts of parliament, encouragement is given to accomplices, for the convicting of offenders, by offering to the said accomplices a pardon. 4 *Black.* 330.

Confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. But wherever a man's confession is made use of against him, it must be all taken together, and not by parcels. 2 *Haw.* 429.

Sometimes there is a confession in a civil action; but not usually of the whole complaint, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default: but, sometimes, after tender and refusal of debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to confess the debt and plead the tender; for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs. 4 *Black.* 303.

So, in order to strengthen the creditor's security, it is usual for the debtor to execute a warrant of attorney to confess judgment in an action to be brought by such creditor; which judgment, when confessed, is complete and binding. 3 *Black.* 397.

CONFIRMATION of lands, is of a nature nearly allied to a release. Lord *Coke* defines it to be, a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased. It is a strengthening of an estate formerly made, which is voidable, though not presently void: as for example; a bishop granteth his chancellorship by patent, for term of the patentee's life: this is not a void grant, but voidable by the bishop's death, except it be strengthened by the confirmation of the dean and chapter. 2 *Black.* 325.

If tenant for life leases for forty years, and dies during that term, the lease for years is voidable by him in reversion; yet
if

if he hath confirmed the estate of the lessee for years, before the death of the tenant for life, it is no longer voidable, but sure. *Id.*

Confirmation is either *express* or *implied*. *Express*, as by the words "ratify, approve, and confirm." *Implied*, as by the words "have given and granted," "have demised," or the like; which in some cases shall enure to the same intent as the words "have confirmed." *Wood. b. 2. c. 3.*

Every confirmation is *perfecting*, *increasing*, or *diminishing*. *Perfecting*; as when one makes an estate absolute that was conditional. *Increasing*; as when an estate at will is increased to an estate for years. *Diminishing*; as where a landlord confirms the estate of his tenant to hold by lesser rent, or the like. *Id.*

CONFISCATION, from the Latin, *fiscus*, which signified the emperor's treasury, is a forfeiture of lands or goods to the king for certain crimes or misdemeanors. These are by our lawyers termed *forisfacta* (forfeited); that is, such whereof the property is gone away or departed from the owner. Every offence is deemed an injury against the public; and hence in every offence of an atrocious kind, the law hath exacted a total confiscation of the *goods*, and in some cases a temporary, in other cases a perpetual, confiscation of the *lands* of the offender to the king as representative of the public. 1 *Black. 299.*

CONGEABLE, from the French *conge*, leave or permission, signifies in our law as much as *lawful*, or lawfully done with permission; as entry congeable, or the like.

CONGE D'ESLIRE, *leave to chuse*, is the king's writ or licence to the dean and chapter to chuse a bishop, in the time of vacancy of the see.

CONIES: killing conies in the day time, in a lawful warren, inclosed or uninclosed, incurs a forfeiture of treble damages, and three months imprisonment, by 22 & 23 C. 2. c. 25: if it is in the night time, the penalty is transportation for seven years; or lesser punishment by whipping, fine, or imprisonment, as the court shall award, by 5 G. 3. c. 14. But by the Black Act, 9 G. c. 22. if the offender be armed and disguised when he commits such offence, he shall be guilty of felony without benefit of clergy.

If conies are out of the warren, no person hath any property in them, and a man may justify killing them if they eat up his grafs and corn; but no action lies against the owner of the warren. 5 Co. 104.

Conies in a warren go to the heir, and not to the executor. 1 Inst. 8.

CONJURATION. No prosecution shall be commenced or carried on against any person for witchcraft, forcery, enchantment, or conjuration: but if any person shall pretend to exercise any of these, he shall be imprisoned for a year, and set on the pillory once in every quarter of that year, and be further bound to the good behaviour at the discretion of the court. 9 G. 2. c. 5.

CONSANGUINITY, or kindred, is the connexion or relation of persons descended from the same stock or common ancestor: and is either *lineal*, or *collateral*. *Lineal* consanguinity, is that which subsists between persons, of whom one is descended in a direct line from the other; as grandfather, father, and son. *Collateral* consanguinity, is that which subsists between persons descended from the same common ancestor, but not one from another; as brothers, uncles, and nephews. 2 Black. 204.

CONSCIENCE, court of. So early as the reign of king Hen. 8. a court of conscience was established in London, for the recovery of small debts, but not confirmed by act of parliament till the reign of king James the first, which hath since been explained and amended by the statute 14 G. 2. c. 10. The constitution thereof is this: two aldermen, and four commoners, sit twice a week, to hear all causes of debt, not exceeding the value of 40*s.*; which they examine in a summary way, by the oath of the parties, or other witnesses, and take such order therein as is consonant to equity and good conscience. Which method hath been found so convenient, that divers trading towns, and other districts, have obtained acts of parliament upon nearly the same plan.

But this bearing hard against the course of the common law, and dispensing with the constitutional establishment of trial by jury, another plan had been recommended, which hath been adopted by the county of *Middlesex*, and carried into execution by the statute 23 G. 2. c. 33. the substance of which is, 1. That a special county court shall be holden, at least once a month, in every hundred, by the county

county clerk. 2. That twelve freeholders of that hundred, qualified to serve as juries, and struck by the sheriff, shall be summoned to appear at such court by rotation, so as none shall be summoned oftener than once a year. 3. That in all causes, not exceeding the value of 40*s.* the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses upon oath, and make such order therein as they shall judge agreeable to conscience. 4. That no plaint shall be removed out of this court, but the determination therein shall be final. 5. That if any action be brought in any of the superior courts against the person resident in *Middlesex*, for a debt or contract, upon the trial whereof the jury shall find less than 40*s.* damages, the plaintiff shall recover no costs, but shall pay to the defendant double costs; unless upon some special circumstances to be certified by the judge who tried it. 6. A very moderate table of fees is prescribed and set down in the act, which are not to be exceeded upon any account whatsoever. 3 *Black.* 81.

CONSERVATOR, is a protector, or *preserver*, in general: as, anciently, a conservator of truce and safe conduct, a conservator of the privileges of the Templars and Hospitallers, conservators of the levels of the fens. But there was more especially one kind of conservator of which the law took particular notice, and which is of some regard to this day; and that is, a conservator of the peace. Before the institution of the office of justices of the peace, the peace was kept by conservators of the peace in every county, chosen in pursuance of the king's writ by the freeholders in the county court.

And besides these conservators of the peace, properly so called, there were and are other conservators of the peace by virtue of certain offices. As, for instance, the lord chancellor, and every judge of the court of king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizances for it. Also every court of record, as such, hath power to keep the peace within its own precinct. Also every justice of the peace is a conservator of the peace. So is also the sheriff, coroner, and every high and petty constable; who have power to preserve the peace in danger of being broken in their presence, but they have not power to punish the breach of it.

There

There were also other conservators of the peace by *tenure*, who held lands of the king for that service; others by *prescription*, claiming that power by immemorial usage in themselves, and those whose estate they have in certain lands.

The general authority which such conservators of the peace, whether by election, or tenure, or prescription, is, to employ their own, and command the help of others, to arrest and pacify all such who in their presence, and within their jurisdiction and limits, by word or deed, shall go about to break the peace. 2 *Harr.* 32.

CONSIDERATION, is the material cause of any agreement or contract, without which it will not be effectual or binding.

A deed of lands must be founded on good and sufficient consideration. Not upon an usurious contract; nor upon fraud or collusion, either to deceive *bona fide* purchasers, or just and lawful creditors; any of which bad considerations will vacate the deed. 2 *Black.* 296.

A deed, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual, only to the use of the grantor himself. *Id.*

The consideration may be either a *good* or a *valuable* one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation: a *valuable* consideration is such as money, marriage, or the like; which the law esteems an equivalent given for the grant. Deeds made upon *good* consideration only, are considered as merely voluntary; and are frequently set aside in favor of creditors, and *bona fide* purchasers. *Id.* 297.

Consideration in *contracts*, is something given in exchange, something that is mutual and reciprocal; as money given for goods sold, work performed for wages. And a consideration of some sort or other is so absolutely necessary to the forming a contract, that a *nudum pactum*, or agreement, to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As if a man promises to give another 100 *l.* here is nothing contracted for or given on the one side, and therefore there is nothing on the other. But if such promise is authentically proved by written documents, as if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond,
from

from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract. 2 Black. 445. Burr. Mansf. 1671.

Consideration is either *express*, as when a man bargains to give so much for a thing bought, or to sell his land for so much, or grants it in exchange for other lands, or where a man promises to give a sum of money for work to be done by him; or it is *implied*, when the law itself enforces a consideration; as where a man comes to an inn, and, there staying, eats and drinks and lodges, the law presumes he shall pay for the same, though there be no express contract for it.

CONSIMILI CASU, is a writ of entry for the reversioner after alienation by tenant for life. It was given by the statute of 13 Ed. 1. c. 24. which ordains, that where a *like case* happens to that of alienation by tenant in dower, for which a writ is given by 6 Ed. 1. c. 7. the chancery shall make out a writ accordingly. 3 Black. 183.

CONSISTORY, is the court christian or spiritual court, held formerly in the nave of the cathedral church, or in some chapel, ile, or portico, belonging to it; in which the bishop presided, and had some of his clergy for assessors and assistants. But this court is now held by the bishop's chancellor or commissary, and by archdeacons and their officials, either in the cathedral church or other convenient place of the diocese, for the hearing and determining of matters and causes of ecclesiastical cognizance happening within that diocese. From the bishop's court the appeal is to the archbishop, from the archbishop's court to the delegates.

CONSPIRACY. By act of parliament 33 Ed. 1. st. 2. conspirators are defined to be those that confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to be indicted, or falsely to move or maintain pleas. From which definition it seems clearly to follow, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but
that

that those also are guilty of this offence, who basely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such confederacy or not. 1 *Haw.* 189.

For this offence, the conspirators (for there must be at least two to form a conspiracy) may be indicted at the suit of the king, and were by the ancient common law to receive what is called the villenous judgment; namely, to lose their freedom of the law, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and their lands, during life; to have their lands wasted, their houses rased, their trees rooted up, and their bodies committed to prison. But this villenous judgment is by long disuse become obsolete; it not having been pronounced for some ages; but, instead thereof, the delinquents are usually sentenced to fine, imprisonment, and pillory. 4 *Black.* 136.

Or an action of conspiracy may be brought, to obtain a recompence in damages, for the danger to which the party hath been exposed: but in order to this, it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But the more usual way is, to bring a special action on the case, for a false and malicious prosecution; which may be brought against one only, and although there hath been no acquittal upon the indictment; for the action may be brought on such an indictment whereon no acquittal can be; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. 3 *Black.* 126.

CONSTABLES are of two sorts: high constables, and petty constables. High constables are commonly chosen and sworn by the justices of the peace in sessions; and their jurisdiction extends through the several hundreds respectively. Petty constables are chosen and sworn in the leet, and in defect thereof most commonly by the justices. The general duty of both high and petty constables is, to keep the king's peace in their several districts: and they have both of them

abundance

abundance of particulars committed to their charge, as well by the common law, as by fundry acts of parliament.

CONSULTATION, is a writ whereby a cause being formerly removed by prohibition out of an inferior court into some of the king's courts at *Westminster*, is returned thither again. For if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the inferior court, then, upon *consultation* or deliberation thereof, they decree it to be returned again; whereupon the writ in this case obtained is called a *consultation*. T. L.

CONTEMPT, is an high misdemeanor, by doing what one is forbidden, or not doing what he is commanded. If the sheriff, being required to return a writ directed to him, doth not return it; or if a person, required by such writ to do something, doth not perform it; this is a contempt, punishable by fine and imprisonment. So disobedience to an act of parliament, where no particular penalty is assigned, is a contempt of the statute, and punishable by fine and imprisonment at the discretion of the court. For a contempt of the king's superior courts of justice, the offender is liable to an attachment.

CONTENEMENT, (*contenementum*,) is said to signify a man's *countenance* or credit, which he hath together with and by reason of his freehold. But it seems more properly to be restricted to the estate which he holds in land; as where the *magna charta*, c. 14. says, a freeman shall not be amerced for a small fault, but after the manner of the fault, and for a great fault after the greatness thereof, saving to him his *contenement* (*salvo contenemento suo*); that is, that he shall not be fined above what he is able to bear, and leaving to him the means of his future support: so the statute goes on—a merchant shall not be fined, but saving to him his merchandize; and a villein, saving to him his wainage.

CONTENTIOUS JURISDICTION, in ecclesiastical causes, is where there is an action or judicial process, and it consists in hearing and determining the matter between party and party; in contradistinction to *voluntary jurisdiction*,
7 which

which is exercised in matters that require no judicial proceeding, as in granting institution, probate of wills, letters of administration, sequestration of vacant benefices, and such like.

CONTINGENT LEGACY, is a legacy which may happen or not happen, according to the circumstances of a future event. If a legacy be left to one *when* he shall attain, or *if* he shall attain, the age of twenty-one years, this is a contingent legacy; and if the legatee dies before that time, the legacy shall not vest. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*; and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the legatee had lived. But if such legacy be charged upon a real estate, the temporal courts will not suffer it to be raised, but it shall lapse for the benefit of the heir at law. 2 *Black.* 513.

CONTINGENT REMAINDER, is where no present interest passes, but the estate is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect. As if a tenant for life, with remainder to *B.*'s eldest son (then unborn) in tail, this is a contingent remainder, with respect to the *person*, for it is uncertain whether *B.* will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested: though, if *A.* had died before the contingency happened, that is, before *B.*'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. So, where the *person* to whom the remainder is limited is fixed and certain, it may be contingent with respect to the *event*, where that event is vague and uncertain. As where land is given to *A.* for life, and in case *B.* survives him, then with remainder to *B.* in fee; here *B.* is a certain person; but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving *A.* During the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but it is gone for ever; but if *A.* dies first, the remainder to *B.* becomes

becomes vested: A contingent remainder is *executory*, and a vested remainder is *executed*. 2 *Black.* 169.

CONTINGENT USE, is a use limited in a deed of lands, which may or may not happen to vest, according to the contingency expressed in the limitation of such use: and a use in contingency is such as by possibility may happen in possession, reversion, or remainder. 1 *Co.* 121.

CONTINUAL CLAIM, is a claim made from time to time, within every year and day, to land or other thing, which in some respect a man cannot obtain without danger: as if a man be disseised of land, into which, though he hath a right of entry, he dares not enter for fear of death, or of maiming or beating, it behoves him to hold on his right of entry at his best opportunity, by approaching as near as he dares, once a year, as long as he lives, and to save the right of entry to his heir. And in such case, although the disseisor dieth seised in fee, and the land descend to his heir, yet may he who is disseised enter upon the possession of the heir, notwithstanding the descent; for by such claim he hath presently a possession or seisin in the lands, as well as if he had entered in deed, although he never had possession or seisin of the same lands or tenements before the said claim. *Litt. f.* 414. 419.

Also, if land be let to a man for term of his life, remainder to another for term of life, remainder to a third in fee, if tenant for life alien to another in fee, and he in remainder for life maketh continual claim to the land before the dying seised of the alienee, and after the alienee dieth seised, and after he in remainder for life die before any entry made by him; in this case, he in the remainder in fee may enter upon the heir of the alienee, by reason of the continual claim made by him who had the remainder for life, because that such right as he had of entry shall go and remain to him in the remainder after him, inasmuch as he in the remainder in fee could not enter upon alienee in fee during the life of him in the remainder for life, and for that he could not then make continual claim. For none can make continual claim but when he hath title to enter. *Litt. f.* 416.

But every doubt or fear in such case is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses,
or

or the taking away or spoiling of his goods, this is not sufficient, because he may recover the same, or damages to the value, without any corporal hurt. 1 *Inst.* 253.

And if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man; as if the adverse party lie in wait in the way with weapons, or by words menace to beat, maim, or kill him that would enter; and so, in pleading, he must shew some just cause of fear, for fear of itself is internal and secret. *Id.*

CONTINUANCE, is the continuing of a cause in court, by an entry upon the record there for that purpose. For during the whole course of proceeding in an action, it is necessary that both the parties be kept or *continued* in court from day to day till the final determination of the suit. For the court can determine nothing unless in the presence of both the parties, in person, or by their attorneys, or upon default of one of them, after his original appearance, and a time prefixed for his appearance in court again. And in the course of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigency of the case may require. And the giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. And if these continuances are omitted, the cause is thereby said to be *discontinued*, and the whole must begin *de novo*. 3 *Black.* 315.

CONTINUANDO, is a word used in a special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action; and to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuando* to the whole time in which the rest of the trespass was done. As where the herbage is spoiled or consumed by the defendant's cattle, the declaration may allege the injury to have been committed by continuation from one given day to another (which is called laying the action with a *continuando*), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 3 *Black.* 212.

CONTRABAND GOODS (from *contra*, against, and *ban*,

and, an edict or proclamation) are those which are prohibited by act of parliament, or the king's proclamation, to be imported or exported.

CONTRACT, is a covenant or agreement between two or more persons, with a lawful consideration or cause. And it is twofold; either *express*, or *implied*. *Express* contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as to deliver an ox, or a load of timber, or to pay a stated price for certain goods. *Implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labour deserves: if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. 2 *Black.* 443.

When a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money, it is a contract; but if he do not, it is no contract. *Noy, Max.* 87. *Hob.* 41.

The property of any thing sold is in the buyer immediately by the contract; though regularly it must be delivered to the buyer, before the seller can bring his action for the money. *Noy*, 88.

If one contract to buy a horse or other thing of me, and no money is paid, or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases, no action will lie for the money or the thing sold, but it may be sold to another. *Plowd.* 128. 309.

All contracts are to be certain, perfect, and complete: for an agreement to give so much for a thing as it shall be reasonably worth, is void for incertainty; so a promise to pay money in a short time, or to give so much if he likes the thing when he sees it. *Dyer.* 91. 1 *Bullstr.* 92. But if I contract with another, to give him 10*l.* for such a thing, if I like it on seeing the same, this bargain is said to be perfect at my pleasure. Yet I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action upon the case against him. *Noy*, 104.

By the statute of frauds and perjuries, 29 C. 2. c. 3. no contract for the sale of goods, to the value of 10*l.* or more,

shall be valid, unless the buyer actually receive part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith.

CONTRAFACTION, counterfeiting.

CONTRAMANDATIO, a countermand.

CONTRIBUTION is, where every one pays his share, or *contributes* his part to any thing. One parcener shall have contribution against another; one heir, against another heir, in equal degree; and one purchaser shall have contribution against another. So where goods are cast into the sea for the safeguard of the ship, there is a contribution amongst the merchants, towards the loss of the owners of the goods.

CONTROLLER, (*contra rotulator*), is an overseer or officer relating to the public accounts. There are divers officers of that denomination; as controller of the *king's household*; of the *navy*; of the *customs*; of the *excise*; of the *mint*; and many others.

CONVENT, *conventus*, signifies the fraternity of a religious house; as of an abbey, or priory. So a *conventual church*, is a church that consists of regular clerks, professing some of the religious orders. In the conventual cathedrals, the bishop was in the place of the abbot or prior.

CONVENTICLE, a private assembly or meeting for the exercise of religion.

CONVENTIO, in the ancient law proceedings, signifies a *covenant*, or agreement.

CON-

CONVENTION PARLIAMENT, was a parliament that *convened* or assembled on the abdication of king *James* the second, and settled the crown on king *William* and queen *Mary*.

CONVERSION is, where a man hath applied (converted) the goods of another to his own use. In every action of *trover*, it is necessary to prove a *conversion*. For a man may come lawfully into the possession of another man's goods, but the injury lies in the conversion. Evidence of a conversion is, if a man sells the goods, or uses them without the owner's consent, or refuses to deliver them when demanded; for refusal alone is *prima facie* sufficient evidence of a conversion. 3 *Black.* 152.

CONVEYANCE, is a writing sealed and delivered, whereby the property of lands and tenements is *conveyed* from one person to another. Of conveyances, some are called *original* or *primary* conveyances, which are those by means whereof the estate is created, or first arises; namely, feoffment, gift, grant, lease, exchange, partition: others are *derivative* or *secondary*, whereby the estate, originally created, is enlarged, restrained, transferred, or extinguished; and these are, release, confirmation, surrender, assignment, defeazance. 2 *Black.* 309.

CONVICTION is, when the party upon his trial is found guilty of the charge laid against him; and this may be two ways, either by confessing the offence, or being found guilty upon evidence.

CONVOCATION, is a word that is most commonly applied to assemblies of the clergy, *called together*, originally by mandate from the archbishop, and afterwards by the king's writ. Their assembly by virtue of the archbishop's mandate, was to transact affairs relating to the order and government of the church. The king called them together, chiefly to grant aids and subsidies for the support of government; and in the reign of king *Hen.* 8. they were restrained from proceeding in ecclesiastical matters without the king's licence. Afterwards, in the reign of king *Charles* the second, by a sort of tacit agreement, the clergy waved their privilege of taxing themselves, and were included with the temporality in the money bills prepared by the house of commons, and were admitted to vote in the election of members

of that house; and from that time have become only a shadow of an ecclesiastical assembly, and have never passed any synodical act.

COPARCENARY. An estate held in coparcenary is, where lands of inheritance descend from the ancestor to two or more persons. It arises either by *common law*, or *particular custom*. By *common law*; as where a person seised in fee simple or fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case, they shall all inherit. And these coheirs are then called *coparceners*; or, for brevity sake, *parceners* only. *Parceners* by *particular custom* are, where lands descend, as in gavel-kind, to all the males in equal degree, as sons, brothers, uncles, or other kindred; and, in either of these cases, all the parceners put together make but one heir, and have but one estate among them. 2 *Black.* 187.

Coparceners always claim by descent, whereas jointenants always claim by purchase or acquisition. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but jointenants. 2 *Black.* 188.

By the death of any of the coparceners, the coparcenary is not severed or divided; for if one die, her part shall descend to her issue. 1 *Inst.* 164.

And sometimes the descent is *in stirpes*, to the stocks or roots; and sometimes *in capita*, to the heads: as if a man hath issue two daughters, and dieth, that descent is *in capita*, viz. that every one shall inherit alike. But if a man hath issue two daughters, and the elder daughter hath issue three daughters, and the younger one daughter, all these four shall inherit: but the daughter of the younger shall have as much as the three daughters of the elder, by reason of the roots, and not by reason of the heads; for in judgment of law every daughter hath a several stock or root. 1 *Inst.* 164.

Also, if a man hath issue two daughters, and the elder hath issue divers sons and divers daughters, and the younger hath issue divers daughters; the eldest son of the elder daughter shall only inherit, for this descent is not *in capita*; but all the daughters of the younger shall inherit, and the eldest son is coparcener with the daughters of the younger, and shall have one moiety; namely, his mother's part. So that men descending of daughters may be coparceners, as well as women, and shall jointly implead, and be impleaded. 1 *Inst.* 164.

If they cannot agree about a partition, the compulsory method is, for one or more to sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanelled, and assign to each of the parceners her part in severalty. For the easier proceeding wherein, the statute of 8 & 9 *W. c.* 31. hath given particular directions.

But there are some things that are in their nature impartible. The mansion house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or, if that cannot be, then they shall have the profits of the things by turns. 2 *Black.* 189.

In the case of an advowson, if they cannot agree in the presentation, the eldest and her issue, or even her husband or her assigns, shall present alone before the younger. *Ibid.*

COPPER COIN, counterfeiting it, by statute 15 & 16 *G. 2. c.* 28. incurs the penalty of two years imprisonment, and binding to the good behaviour for two years more. And by 11 *G. 3. c.* 40. the said offence, as also the buying, selling receiving, or putting off, any counterfeited copper money at less value than it imports to be of, is made felony (but within clergy).

COPY (*copia*), is in a legal sense the transcript of an original writing; as the copy of a patent, of a charter, of a deed, and the like.

Where a deed is inrolled, a copy thereof may be given in evidence. 3 *Lev.* 387. So the copy of a record is admitted as evidence, because the party cannot have the record itself. 10 *Co.* 92.

Where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like, copies of them, in such cases of necessity, have been allowed as evidence. *Jenk.* 19.

The copy of the probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original, taken by authority, and of a public nature: otherwise where the will is of things in the realty, for as to these the probate is of no force or validity. 3 *Salk.* 154.

So the copy of a court roll of a manor is good evidence, as also the copy of a parish register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *L. Raym.* 154.

And, generally, wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154.

A copy of an indictment and acquittal of felony is necessary, in order to intitle the person acquitted to bring his action against the prosecutor of the indictment: but such copy is seldom granted, if there is any the least probable cause upon which to found such prosecution. For it would be a great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable be sued at law, whenever their indictments miscarried. *L. Raym.* 253. 3 *Black.* 126.

COPYHOLD:

1. *Origin of copyhold.*
2. *Of courts baron.*
3. *Copyhold, how transferable.*
4. *Surrender.*
5. *Presentment.*
6. *Admittance.*
7. *Fine.*
8. *Waste.*
9. *Forfeiture and escheat.*
10. *In what cases equity will relieve.*
11. *Heir of the copyholder.*
12. *Tenant in dower and by curtesy.*

1. *Origin of Copyhold.*

A MANOR, *manerium*, a *manendo*, because the usual residence of the owner, was a district of ground holden by lords or other great men; who kept in their own hands so much as was necessary for the use of their families, which were called *terra dominicales*, or demesne lands; others they distributed among their tenants; and the residue, being uncultivated,

cultivated, was termed the lord's waste, and served for common of pasture to the lord and his tenants. 2 *Black.* 90.

Before the statute of *quia emptores terrarum*, 18 *Ed.* 1. the king's greater barons, who had a large extent of territory holden under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which, therefore, now continue to be holden under a superior lord, who is called in such cases the lord *paramount* over all those manors; and his seignior is frequently termed an *honour*, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 *Black.* 91.

In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be holden as of themselves, and were so proceeding downwards in *infinitum*, till the superior lords observed, that by this method of subinfeudation, they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of terre-tenant, or him who occupied the land. *Ibid.*

This occasioned the statute of *quia emptores terrarum* to be made; which directs, that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. And from hence it is holden, that all manors existing at this day, must have existed by immemorial prescription, or at least ever since the 18 *Ed.* 1. when the statute of *quia emptores terrarum* was made. *Ibid.*

The tenants to whom these lands were granted, were of two different kinds: to wit, such as had the honour to attend the lord in his wars, and were therefore termed free tenants; and such as were to perform the drudgery or viler offices, and were thereupon styled *villeins*, and their tenure *villanage*, or *base* tenure.

These villeins were in a state of downright servitude, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. 2 *Black.* 92.

They were either villeins *regardant*, that is, annexed to the manor or land; or else they were *in gross*, or at large; that is annexed to the person of the lord, and transferrable by deed from one owner to another. They held indeed small portions of land by way of sustaining themselves and families; but it

was at the mere will of the lord, who might dispossess them whenever he pleased. 2 *Black.* 93.

The *customs* of manors differ as much as the humour and temper of the respective ancient lords: so a copyholder by custom may be tenant in fee simple, in fee tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition; subject, however, to be deprived of these estates upon the concurrence of those circumstances, which the will of the lord, promulged by immemorial custom, hath declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue, in others the want of issue male, in others the cutting down timber, in others the non-payment of rent or fine. Yet none of these interests amount to freehold; for the freehold of the whole manor abideth always in the lord only, who hath granted out the use of occupation, but not the corporal seisin, or true possession, of certain parts or parcels thereof, to these his customary tenants at will. 2 *Black.* 148.

And, in general, every thing still remaineth in the lord, that custom hath not taken out of him. *Bur. Mansf.* 1277.

Originally, the copyholder had in judgment of law only an estate at will; but, in process of time, custom hath so established and fixed his estate, that, by the custom of the manor, it is descendible, and his heir shall inherit it; and therefore his estate is not merely at the will of the lord, but at the will of the lord *according to the custom of the manor*. So that custom is the life and soul of copyhold estates; for without custom, or if the copyholders have broken their custom, they are subject to the will of the lord. And by custom a copyholder may as well inherit according to the custom, as a freeholder may inherit at the common law, 4 *Co.* 21, 22.

And when custom hath created such inheritances that they shall be descendible, then the law will direct the descent according to the maxims and rules of the common law, as incident to every estate descendible; as when uses had gained the reputation of inheritances descendible, the common law directed the descent thereof, as of other inheritances at common law. But such customary inheritances shall not have by law any other collateral qualities which concern not the descent of the inheritance, which other inheritances at the common law have; and therefore such customary inheritance shall not be *assets* to charge the heir in an action of debt upon an obligation made by his ancestor, although
he

he bound himself and his heirs; nor shall the widow of such customary tenant have *dower*; nor the husband be tenant by the *curtesy*; nor shall a descent of such estate take away the *entry* of him who hath a customary right thereto. For, if without custom such estate at will cannot be descendible, so without custom it cannot have any collateral quality incident to inheritances at common law. 4 Co. 22.

But by special custom it may have any or all these qualities; and by the statute of the 13 *El. c. 7.* the copyhold or other customary estate of a bankrupt is made liable to the payment of his debts.

If the custom be, that copyhold land may be granted in fee simple, a grant to one and the heirs of his body is also within the custom; so also it may be granted for life, or for years, by the same custom; for an estate in fee simple includes the whole; and it is a maxim in law, that he who can do the greater, can impliedly do the less. 4 Co. 23.

They are called tenants by copy, because they have no other evidence concerning their tenements, than the copies of the rolls of the court. 4 Co. 25.

2. Of Courts Baron.

A court baron is an inseparable incident to a manor, and must be held by prescription; for it cannot be created at this day.

It must be holden within the manor; for if it be holden out of the manor, it is void; unless a lord, being seised of two or three manors, hath usually time out of mind kept at one of his manors courts for all the said manors, then by custom such courts are sufficient in law, although they be not holden within the several manors. 1 *Inst.* 58.

This court is of two natures:

1. By common law, which is the baron's or freeholders' court, or the court baron that is incident to every manor; of which the freeholders being suitors are the judges, and the steward is only the register. It was formerly held every three weeks, and its most important business is to determine, by writ of right, all controversies relating to the right of land within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40*s.* But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff; and the proceedings

ceedings in all other actions may be removed into the superior courts by the king's writs. 3 *Black.* 33.

2. The copyholders' or customary court; which is for grants and admittances upon surrenders and descents, on the presentment of the homage or jury. They may inquire of all persons that owe suit to this court, and make default, and present their names. They may inquire of the death of tenants since the last court, and who is the next heir: of fraudulent alienations of lands to defeat the lord of his profits: of rent, custom, or service withdrawn: of escheats and forfeitures: of incroachments, cutting down trees, suffering houses to decay, or other like wastes: of suits not performed at the lord's will by reason of tenure: of surcharging or putting uncommonable beasts upon the common: of trespass in the common by digging, building, or inclosing: of removing mere-stones or land-marks: of by-laws not observed, and other violations of the custom.—The punishment is by amerciamment: but the steward cannot amerce without assessorers, sworn to assess or moderate the amerciamment; and then the lord may have an action in his court for the amerciamment assailed. *Wood. b. 4. c. 1. f. 17.*

3. Copyhold, how transferable.

Copyholds are not transferable by matter of record, even in the king's courts; but only in the court baron of the lord, by surrender and admittance. 2 *Black.* 366.

If one would *exchange* a copyhold with another, both must surrender to each other's use, and the lord admit accordingly. *Co. Copyh. f. 36. 39.*

If a man will *devise* his copyhold estate, he cannot do it by his will, but he must surrender to the use of his will, and in his will declare his intent. *Id.*

But when the legal estate is in *trustees*, a man cannot in that case surrender the copyhold lands to the use of his will; but they will pass by his will only. 2 *Atk.* 38. 1 *Vez.* 489.

So a *mortgagor* may dispose of the equity of redemption by will, without surrender; for he hath at that time no estate in the land whereof to make a surrender. *Prec. Chas.* 322. 520.

A devise of a copyhold to the *heir* is void; for where two titles meet, the worthier is to be preferred. *Str.* 489.

A copyhold may be *intailed* by special custom, and the intail cut off by *recovery* or *surrender* in the lord's court.

But

But a *recovery* in the lord's court, without custom to warrant it, will not be a bar to an intail; but a *surrender* in that case will bar it. 2 *Vez.* 603.

But where there are two customs to bar estates tail, one by *recovery*, the other by *surrender*, either of them may be pursued. *Str.* 1197.

Recovery in the lord's court differs in nothing that is material from recoveries of freehold land in the king's courts; but the method of *surrender* is easier and cheaper. 2 *Black.* 365. *Str.* 1197.

A copyhold is not barred by *fine* and five years non-claim; *Noy.* 23.

4. *Surrender.*

Surrender, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the *surrender* are expressed. 3 *Black.* 365.

A steward of a manor may take a *surrender* out of the manor, but cannot admit out of the manor. 4 *Co.* 26.

The process in most manors is, that the tenant comes to the steward, either in court (or, if the custom permits, out of court), or to two customary tenants of the same manor (provided that also have a custom to warrant it); and there, by delivering up a rod, or glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and to such uses as the custom of the manor will warrant. 2 *Black.* 366.

A *ferme-covert* is to be secretly examined by the steward, on her *surrendering* her estate. 1 *Inst.* 59.

5. *Presentment.*

If the *surrender* be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which *presentment* is an information to the lord or his steward, of what had been transacted out of court. 2 *Black.* 366.

It is the general custom of copyholds, that the *surrenderee* must come and have the *surrender* presented at the next court, otherwise it is void, and a new *surrender* must be taken; but there are several copyholds and other customary estates,

estates, where the tenant need not come under three courts. 2 *Vez.* 302.

So a custom that the mortgagee need not to present his mortgage deed at the first court, nor until the third court, is a good custom. *Id.*

And if the surrenderor die before the next court, yet the surrenderee may come and be admitted afterwards; the death of the surrenderor in the mean time making no difference. *Id.*

So if the surrenderee dies before presentment, yet, upon presentment made after his death, his heir shall be admitted. So also if those, into whose hands the surrender is made, die before presentment; for, on proof in court that such surrender was made, the lord may be compelled to admit accordingly. 2 *Black.* 369.

6. Admittance.

Immediately upon such surrender out of court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to the surrenderee or *cestuy que use*, to hold by the ancient rents and customary services, and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender. And this is done by delivering up to the new tenant the rod or glove, or the like, in the name, and as the symbol, of corporal seisin. 2 *Black.* 366.

The lord himself may admit out of the manor at what place he pleases; but the steward cannot admit at any court out of the manor. 4 *Co.* 26.

But where by custom, as is aforesaid, a court is holden out of the manor, as where a court is holden in one manor for the same and divers other manors, admittances made there will be sufficient. 1 *Inst.* 58.

Admittance of tenant for life is an admittance of him in remainder, but not to prejudice the lord of his fine which was due by custom. 4 *Co.* 23.

Where a grant or admittance is made by one who hath a lawful estate or interest, the copyholder is in by the custom, without any regard to the condition or person of the grantor; and therefore such admittance made by husband and wife shall bind the wife, notwithstanding the coverture: so also of a grant made by one *non compos mentis*, or an infant, or by a bishop, prebendary, parson, or the like, this shall bind for ever. 4 *Co.* 23.

Until

Until admittance of the surrenderee, the surrenderor continues tenant, and shall receive the profits, and discharge all services due to the lord; but he cannot revoke his surrender, except in the case of a surrender to the use of his will, which is always revocable. And if the lord will not admit the surrenderee, he may be compelled to it by a bill in chancery, or a mandamus. 2 *Black.* 368.

And this method of conveyance, by surrender and admittance, is so essential to the nature of a copyhold estate, that it cannot possibly be transferred by any other assurance. No feoffment, fine, or recovery, in the king's courts has any operation upon it. *Ibid.*

7. *Fine.*

Upon admittance, the tenant pays a fine to the lord, according to the custom of the manor, and takes the oath of fealty. 2 *Black.* 366.

And no fine is due to the lord, either upon surrender or descent, until admittance, for the admittance is the cause of the fine. 4 *Co.* 28.

Of fines, some are by the change or alteration of the lord, and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant, either by the act of God, or by the act of the party, a fine may be due. For if the lord do allege a custom within his manor, to have a fine of every of his copyholders of the said manor, at the alteration or change of the lord of the manor; be it by alienation, demise, death, or otherwise, this is a custom against law, as to the alteration or change of the lord of the manor by the act of the party, for by that means the copyholders may be oppressed by multitude of fines by the act of the lord. But when the change groweth by the act of God, there the custom is good, as by the death of the lord. 1 *Inst.* 59.

Again, of fines some are *certain* by custom, and some are *uncertain*; but that fine though it be uncertain, yet must be reasonable; and if the court, where the cause dependeth, adjudges the fine exacted to be unreasonable, then is not the copyholder compellable to pay it; for all excessiveness is abhorred in law. 1 *Inst.* 59.

Even where the fines are *arbitrary*, the courts of law have tied them down to be reasonable in their extent, otherwise they might amount to a disherison of the estate. No fine therefore

therefore is allowed to be taken upon descents or alienations (unless in particular circumstances) of more than two years improved value of the estate. 2 *Black.* 98.

If the lord, where the fines are *uncertain*, assesses a reasonable fine, and require the copyholder to pay it, the copyholder is not bound to pay this immediately, because he could not know what fine the lord would assess, and therefore he could not provide any certain sum, and for this cause he shall have a convenient time to pay it in, if the lord himself limit no certain day for the payment thereof; but otherwise it is of fines certain. 4 *Co.* 27, 28.

If the fines of infants and femmes covert are not paid in three months after demand, the lord may enter and receive the profits till he is satisfied. And if the guardians or husbands pay the fine, they or their executors or administrators may enter and repay themselves out of the rents and profits. 9 *G. c.* 29.

But by the custom of divers manors, if an infant comes in by descent, the fine is not payable until he is of full age.

8. *Waste.*

The copyholder, by the custom in some places, ought to repair and uphold the houses: for what a copyholder may or ought to do or not do, the custom of the manor must direct: but if there be no custom to the contrary, *waste*, either permissive or voluntary, of a copyholder is a forfeiture of his copyhold. 1 *Inst.* 63.

A copyholder by the common law may cut off the under boughs, which cannot cause any waste, but the amputation of the top boughs will cause the putrefaction of the whole tree, wherefore it is waste as well as the decapitation thereof. *Cro. El.* 361.

9. *Forfeiture and Escheat.*

If the copyholder doth not pay the services due to the lord, or refuses to attend at the lord's court, or to be of the homage, or to pay his fine for admittance, or to do suit to the lord's mill, or the like, it is in law a forfeiture. 1 *Roll's Abr.* 509.

If there be tenant for life, remainder in fee, and the tenant for life commits a forfeiture, by which the estate of the tenant for life is forfeited, and the lord enters for the forfeiture,

feiture, yet this shall not bind him in remainder, but only the tenant for life. 1 *Roll's Abr.* 509.

If a copyholder commits felony or treason, he forfeits his copyhold to the lord, without any particular custom; only the king shall first have thereof the year, day, and waste. *Gilb. Ten.* 226.

If a copyhold escheats, the lord may grant it out again with what improved fine he will. *Het.* 6.

10. *In what Cases Equity will relieve.*

In case of non-payment of rent or fine, the chancery may relieve a copyhold tenant; for the estate in such cases is but in nature of a security for those sums, and the lord may be recompensed in damages. *Ch. Prec.* 572.

And it is a rule in equity to relieve against forfeitures, where a complete satisfaction can be made for the injury which is the cause of the forfeiture. *Str.* 449.

But equity will not supply the defect of a surrender to the use of a will in disfavour of the heir at law, unless it be in behalf of a son or a daughter, and not then neither, if it be to disinherit the eldest son, unless he be otherwise provided for. 1 *Salk.* 187.

But a defect of surrender will be supplied for creditors, where there is a general devise of real estate, and no other real estate, to pay debts. 2 *Vez.* 582.

11. *Heir of a Copyholder.*

Where a customary estate of inheritance is descendible to the heir, he may before admittance enter and take the profits, and may surrender to the lord to the use of another person, but not to prejudice the lord of the fine due to him by the custom of the manor upon descent. And in this case he is tenant by copy of court roll, the copy made to his ancestor appertaining unto him, even as the admittance of a tenant for life is the admittance of him in remainder, to vest the estate in him, but not to bar the lord of his fine which he ought to have by the custom. 4 *Co.* 22.

Infants and femes covert may be admitted by guardian or attorney; and on non-payment of the fine, the lord may enter and hold till he is reimbursed. 9 *G. c.* 29.

12. *Tenant in Dowry, or by the Curtesy.*

A wife shall not have dower of a copyhold, unless by special custom. 4 *Co.* 30.

But

But by custom she shall have dower; as in some places she hath one-third of the copyhold, in others one half, in others the whole, according as the custom hath been. *Litt. f. 37.*

Also by custom the husband shall be intitled by the curtesy; and whether any or what fines, or proportion thereof, he or the widow shall pay, or whether they shall be admitted, or the heir, depends upon the custom of the respective manors.

The widow's title doth not commence till after the death of the husband, and not immediately upon the marriage, as in freehold lands; and therefore the husband in his lifetime may defeat her title by alienation, and she shall only have her widow's estate out of the lands whereof her husband died possessed. 4 *Mod.* 452.

COPYRIGHT, of authors. See Books.

CORBEL, is a nich in the wall of a church or other structure, in which an image was placed; and *corbel stones* were smooth polished stones for the front or outside of the corbels or niches; some of which images still remain in several churches; but most of them have been demolished. And the word is still retained in the North.

CORD of wood, is a quantity of wood eight foot long, four foot broad, and four foot high.

CORDAGE FOR SHIPPING. By 25 G. 3. c. 56. several regulations are made concerning the making and using thereof.

CORDINER, from the French *cordouannier*, a shoemaker, vulgarly called a *cordwainer*.

CORIUM, a hide or skin: *corium forisfacere*, to forfeit his skin, was, when a person was condemned to be whipped: so also *corium perdere*. And *redimere corium* was, when the party compounded for a whipping.

CORNAGE, according to *Littleton*, was a species of grand serjeanty, in the North parts of *England*, by blowing a horn to give notice when the enemy was approaching. But it seems rather to have been a payment in money to find scouts and horners in general. In *Westmorland* it still exists, and was granted in the reign of king *John*, together with the sheriffwick,

sheriffwick, by the name of the *rent* of the county of *Westmorland*; and is now paid by the name of *neatgeld*.

CORODY, is an allowance of meat, drink, money, cloathing, lodging, and such like necessities for sustenance. The king, by the ancient law, is intitled to a corody, out of every bishoprick; that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him, till the bishop promotes him to a benefice. This is in the nature of an acknowledgment to the king, as founder of the see; since he had formerly the same corody or pension from every abbey or priory of royal foundation. But these corodies are now totally fallen into disuse. 1 *Black.* 283.

CORONATUS, was anciently the designation of a clergyman; properly, such an one as had received the first tonsure, as preparatory to superior orders; which tonsure was in the form of a *corona* or crown of thorns.

CORONERS, are ancient officers by the common law, so called, because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 *Haw.* 42.

On a vacancy of the office of coroner, a writ issues out of chancery, called a writ *de coronatore eligendo*, directed to the sheriff to call together the freeholders of the county, for the choice of another coroner; and to certify into the chancery both the election, and the name of the party elected, and to administer to him his oath duly to execute his office. In some places, lords of franchises or others have by charter power to appoint coroners.

Commonly there are four coroners in every county, except in *Wales* and *Cheshire*, where there are but two. 4 *Inst.* 271. And in *Westmorland* there are but two.

The coroner's power is chiefly in taking inquisition, when any person comes to an unnatural death. In which case, he must summon a jury to attend at the place, unto whom he shall administer an oath to inquire, upon view of the body, how the party came by his death. He shall also inquire of the murderer's lands or goods, and whether he fled; and shall also inquire of deodands; and where any is found culpable, he shall certify the inquisition, and bind over the witnesses to the next assizes. He is also to inquire of treasure trove; and execute process in case there be any just exception

exception to the sheriff; and must pronounce judgment of outlawry in the county court.

For his fees, he shall have 20s.; and also 9d. for every mile he shall travel from home to take the inquisition. 25 G. 2. c. 29.

He is chosen for life; but he may be removed by the king's writ *de coronatore exonerando*, for a cause to be therein assigned; as that he is incapacitated by years, or sickness, or absence; or if he shall be convicted of extortion, or neglect of duty, or misdemeanor; in such case the court, before whom he shall be convicted, may adjudge him to be removed from his office.

CORPORATION:

1. A corporation is a person or persons in a *political* capacity, created by the law, and styled a *body politic*; that is, framed by *policy* or fiction of law, to endure in perpetual succession, with capacity to take and grant, sue and be sued. *Wood. b. 1. c. 8.*

For in judgment of law, a corporation never dies; and therefore the predecessors who lived many ages ago, and their successors now in being, are one and the same body corporate. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them, so long as the corporation subsists. 2 *Black. 430.*

2. Corporations are either *aggregate* or *sole*. A corporation *aggregate* consists of many persons united together in one society; of which kind are, the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. 1 *Black. 469.*

3. A corporation *sole* consists of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In which sense the king is a sole corporation, so is a bishop, so are some deans and prebendaries, distinct from their several chapters, and so is every parson and vicar. *Id.*

4. Another division of corporations, whether aggregate or sole, is into *ecclesiastical* and *lay*. *Ecclesiastical* corporations are, where the members that compose the same are intirely spiritual persons; such as bishops, deans, and chapters, certain deans and prebendaries in their sole capacity, all archdeacons, parsons, and vicars. *Id.*

5. *Lay*

5. *Lay corporations* are erected for a variety of *temporal* purposes. The king, for instance, is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the crown intire; for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district; as a mayor and commonalty, bailiff and burgesses, or the like: some, for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns: and some for the better carrying on of divers special purposes, as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of medical science; the royal society, for the advancement of natural knowledge. *Id.* 470.

6. Of these lay corporations some are stiled *eleemosynary*, being such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he hath directed. Of this kind are all hospitals for maintenance of the poor, sick, and impotent; and all colleges, both in and out of the universities, as at *Manchester*, *Winchester*, and *Eaton*. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although in some things they partake of the nature, privileges, and restrictions of ecclesiastical bodies. *Id.* 471.

7. A corporation or body politic may commence or be made by the common law, by the king's charter or letters patent, by act of parliament, or by prescription. 1. By the common law, as the king, bishops, some deans, archdeacons, prebendaries, parsons, vicars, churchwardens, to some purposes. 2. By the king's charter or letters patent; to which purpose he may also communicate his authority to others. 3. By act of parliament; so the college of physicians in London was made a corporation. 4. By prescription; as that which hath been and continued a corporation time out of mind, though the charter by length of time or other accident hath been lost. *Wood. b. 1. c. 8.*

8. When a corporation is erected, a *name* must be given to it; and by that name alone it must sue and be sued, and do all other legal acts. 1 *Black.* 474.

9. To every corporation there are several essential incidents: As, 1. To have perpetual succession, for this is the

very end of the incorporation, as there cannot be a succession for ever without incorporation. 2. To sue or be sued, to grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and successors; but under several restrictions imposed by act of parliament. 4. To have a common seal; for though the particular members may express their private consents to any act by words or signing their names, yet this doth not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals. 5. To make by-laws, or private statutes, for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land. But these two last are not applicable to sole corporations. 1 *Black.* 475.

10. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules and *statutes*, which they are bound to observe; but corporations merely lay, constituted for civil purposes, are subject to no particular statutes, but to the common law, and to their own by-laws. *Id.* 477.

11. Of all *ecclesiastical* corporations, in order to inquire into and correct irregularities, the ordinary is *visitor*: so the king, as supreme ordinary, is visitor of the archbishop; the archbishop, of the bishops; the bishops in their several dioceses are visitors of deans and chapters, of parsons and vicars, and of all other spiritual corporations. With respect to *eleemosynary* corporations, the founder and his heirs, or such other as the founder hath appointed, are visitors. Of *civil* corporations, the king is visitor in his court of king's bench. *Id.* 480.

12. In aggregate corporations, the act of the *major part* is the act of the whole. *Id.* 478.

But where the head of a corporation dies, nothing can be done during the vacancy. 1 *Inst.* 263, 4.

13. If an assembly of a corporation be not holden on a charter day or a general day of meeting, there must be previous *notice* to every member, that he may come prepared, and have an opportunity to give his reasons. *Burr. Mansf.* 735.

Where notice is given for one particular business only, the body cannot go on to other business, unless the whole body is met, and it is done by consent. 1 *Barnard.* 80.

When the electors are assembled, to chuse one to fill up a vacancy,

vacancy, those who do not vote, do thereby acquiesce in the election made by those who do: as where there were eleven voters, five voted, and six refused, the court held, that the six virtually consented. *Burr. Mansf.* 1021.

To make a man an *inhabitant* in a corporation, to qualify him to do several corporate acts, it is not sufficient that he barely live in the town, but he ought to be a householder, and also to pay scot and lot. 2 *Barnard.* 408.

No person can be obliged to be a member of a corporation, without his consent. *Burr. Mansf.* 2199.

An election by one single elector only, being the only remaining one, is good, though the power of election be given to the *residue*, or the greater number of them. *Id.* 541.

14. Any particular member may be *disfranchised*, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land, or by having come in by a void election, or the like. 1 *Black.* 484.

But after twenty years unimpeached possession of a corporate franchise, no rule will be granted to shew by what right the possessor holds it: under twenty years, every case must depend upon its own particular circumstances. *Burr. Mansf.* 1962.

Also a man may resign his place in the corporation, if he pleases, by his own voluntary act. 1 *Black.* 484.

15. The corporation itself may be dissolved several ways: As, 1. By act of parliament. 2. By the natural death of all its members without others elected in their places, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king. 4. By forfeiture of its charter through negligence or abuse of its franchises: and in this case, the regular course is, to bring an information in the nature of a writ of *quo warrants*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. *Id.* 485.

And by the common law, corporations were dissolved, in case the mayor or other head officer was not duly elected on the day appointed by charter or established by prescription: but by the 11 G. c. 4. this is remedied, and ample directions given for appointing another.

16. If the corporation, by any of the aforesaid means, comes to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: for the law doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall

shall re-enter; for the cause of the gift or grant faileth.
2 *Black.* 256.

CORPORATION ACT, is an act of parliament, 13 C. 2. *ſ.* 2. *c.* 1. for preventing dissenters from being appointed to offices in towns corporate; whereby it is enacted, that no person shall be elected to any office relating to the government of any city or corporation, unless within a year before he hath received the sacrament of the lord's supper according to the rites of the church of *England*; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office; in default of either of which requisites, the election shall be void.

CORPSE, stealing out of a grave, though it is a matter of great indecency, yet is not felony; but if the shroud or other apparel be stolen with it, this is felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. And the parson, who has the freehold of the soil, may bring an action of trespass for breaking the ground. 2 *Black.* 429.

CORPUS CHRISTI day, is a feast instituted in the year 1264, in honour of the blessed sacrament. The anniversary thereof is the 25th of May.

CORPUS CUM CAUSA, is a writ issuing to bring the body of a prisoner into court, together with the cause for which he is committed.

CORRECTION, house of, is to be built, fitted up, and furnished with tools and implements both for labour and punishment of offenders, at the expence of the county, by the statute 17 G. 2. *c.* 5. 22 G. 3. *c.* 64. & 24 G. 3. *c.* 55.

CORRUPTION OF BLOOD, is where a person is attainted of treason or felony, in which case his blood is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble, and he can neither inherit lands as heir to an ancestor, nor have an heir; but his lands shall escheat to the lord of the fee, subject to the king's year, day, and waste: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through
him

him to a remoter ancestor. But the king's pardon, though it doth not restore the blood, yet as to issues born after, has the effect of a restitution, so as to render them capable to inherit. But restitution of blood, in its true nature and extent, can only be by act of parliament. 2 *Haw.* 456. 4 *Black.* 388.

CORSELET (*corpusculum*), was armour covering the *body* or *trunk* of a man, heretofore used by pikemen, for the better resistance of the assaults of the enemy.

CORSE PRESENT, is said by some to be the same as a *mortuary*, but others distinguish the same from the mortuary, in that the mortuary was a right settled on the church upon a person's decease; and that a corse present was a voluntary oblation usually made at funerals. 1 *Still.* 172.

CORSNED bread, *panis conjuratus*, the morsel of execration. This was a kind of superstitious trial among our *Saxon* ancestors, to purge themselves of any accusation, by taking a piece of bread of about an ounce weight, which was consecrated by a sort of exorcism, praying of the Almighty that it might cause convulsions, and find no passage, if what they affirmed or denied were not true. The form of execration was thus: *We beseech thee, O Lord, that when he who is guilty of this theft hath the exorcised bread offered to him in order to discover the truth, his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.* Du Cange. The old form, or *Exorcismus panis hordeacei ad probationem veri*, is extant in *Lindembrogius*, p. 107. And in the laws of king *Canute*, cap. 6. *Si quis alteri ministrantium accusetur, et amicis destitutus sit, cum sacramentales non habeat, vadat ad judicium quod Anglice dicitur corsned, et fiat sicut Deus velit, nisi super sanctum corpus Dei permittatur ut se purget.* From whence it may seem that the purgation was originally by the very sacramental bread itself, received with solemn abjuration and devout expectation that it would prove mortal to those who dared to swallow it in falsehood, till at length the bishops and clergy were not willing to prostitute the communion bread to such like purposes, but they allowed the people to practice the same judicial rite, in eating some other morsels of bread consecrated to the like uses. This mode of trial

seems to have been an imitation of the trial of jealousy, by the bitter water that caused the curse under the Mosaic law. Num. v. It is recorded of the perfidious Godwin, earl of Kent, in the time of king Edward the Confessor, that, on his abjuring the murder of the king's brother, by this way of trial, as a just judgment for his solemn perjury, the bread stuck in his throat and choked him. *Cum Godwinus comes in mensa regis de nece sui fratris impeteretur, ille post multa sacramenta tandem per buccellam deglutiendam abjuravit, et buccella gustata continuo suffocatus interiit. Ingulph.* This, with other barbarous ways of purgation, was by degrees abolished: though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, I will take the sacrament upon it—May this bread be my poison—May this bit be my last, and such like.

COSTARD, an apple: whence *costard-menger*, a feller of apples.

COSTS. The common law did not professedly allow any costs; though in reality costs were always considered and included in the quantum of damages, in such actions where damages are given; and now, in most cases, costs are given by several statutes. 3 Black. 399.

But the king, or any person suing to his use, also executors or administrators suing in the right of the deceased, and persons suing *in forma pauperis*, shall not pay costs: and for slanderous words spoken, for assault and battery, and for trespass, where the jury shall give less damages than 40*l*. the plaintiff shall have no more costs than damages, unless, in case of assault and battery, the judge shall certify on the back of the record, that an actual battery was proved; and, in case of trespass, that the freehold or title of the land came in question. *Id.* 400.

But if it be in an action wherein there can be no such certifying, as debt, assumpsit, trover, trespass for taking his goods, trespass for spoiling his goods, trespass for beating his servant, whereby he lost his service, it is out of the statute, and the plaintiff may have full costs. 1 Salk. 208.

Where a statute gives a penalty or sum certain to the party grieved, he shall in consequence have costs, because he had a right of action antecedent to bringing the action: but where a sum certain is given to a stranger, as where it

is

is to a *common informer*, or him that shall prosecute, he shall not have his costs; for till he commenced his action he had no right of action in him. 1 *Salk.* 206.

If any person sues in any court any action wherein the plaintiff might have costs, if judgment should be given for him, the defendant shall have costs against the plaintiff, if the plaintiff be nonsuit, or a verdict pass against him. *Burr. Mansf.* 1724.

Where double damages are given by any act of parliament, the costs shall be doubled also; for damages include costs. *Str.* 1048.

Where costs are allowed, it is not necessary that the jury should give the costs, but they may leave it to the court to do it, who are best able to judge of what costs are fitting to be given. It is the course of the court of king's bench, to refer the taxation of the costs to the proper officer of the court, and not to make any special rules for such matters, except it be in extraordinary cases. 1 *Lill. Abr.* 338.

If costs are refused to be paid, an attachment lies. 1 *Nelf. Abr.* 550.

The matter of costs in *equity* is not held to be a point of right, but merely discretionary, according to the circumstances of the case, as they appear more or less favourable to the party vanquished. 3 *Black.* 451.

COTGARE, a kind of refuse wool, *cotted* or clung together, so as it is difficult to rend it asunder.

COTTAGE (*Sax. cote*), is a little house for habitation, without any land belonging to it. By statute 31 *Eliz. c. 7.* cottages were prohibited to be built for habitation, without laying at least four acres of land to the same, and divers other restrictions were thereby enjoined; but the same was repealed by 15 *G. 3. c. 32.* setting forth, that the said statute of 31 *El.* had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population, and in divers other respects was inconvenient to the labouring part of the nation in general.

COVENABLE, *Fr.* convenient or suitable.

A COVENANT, is the consent and agreement of two or more persons, to do or not to do some act or thing contracted between them. *Wood. b. 2. c. 3.*

The

The words of covenanting are, "do covenant, grant, "promise, and agree:" though there needs no great exactness in the words to make a covenant. For if words of *condition*, and words of *covenant*, are coupled together in the same sentence, as *provided always*, and *it is covenanted*—in such case the words may be construed to make a *condition* and a *covenant* also. *Id.* 1 *Inst.* 203.

A covenant is generally either *in fact* or *in law*. *In fact*, is that which is expressly agreed between the parties, and inserted in the deed. *In law*, is that covenant which the law intends and implies, though it be not expressed in words, as if a lessor demise and grant to his lessee an house or lands for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall, during the term, quietly enjoy the same against all incumbrances. 1 *Inst.* 384.

There is also a covenant *real*, and covenant *personal*: A *real* covenant is that, whereby a man binds himself to pass a thing real, as lands or tenements, or to levy a fine of lands; and covenant *personal* is, where the same is annexed to the person, and merely personal, as if a man covenant with another by deed to build him an house, or to be his servant for such a time, or the like. *F. N. B.*

If the covenantor covenants for himself and his *heirs*, it is then a covenant *real*, and descends upon his heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his *personal* assets, as well as his *real*, are likewise pledged for the performance of the covenant, which makes such covenant a better security than any warranty, and it has therefore in modern practice totally superseded the other. 2 *Black.* 304.

If a man binds himself by express covenant *in deed*, to repair an house, and it is burned down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by contract: But he is not so bound by covenant *in law*, for where houses are blown down by tempest, or the like, the law excuses the lessee in an action of waste. 1 *Lill. Abr.* 349.

If a covenant is unlawful in the substance thereof, or impossible, it is void. *Wood. b. 2. c. 3.*

A covenant for the lessee to enjoy against all men, extends not to wrongful acts and entries, for which the lessee hath his proper remedy against the aggressors: but if it be to save harmless against a certain person, there the covenantor must save

save the covenantee harmless against the entry of that person, be it by wrong or rightful title. *Cro. Eliz.* 213.

A covenant is to be taken most strongly against the covenantor, and most to the advantage of the covenantee. *Wood.* *ibid.*

A covenant to pay a rent-charge clear of all taxes, doth not extend to taxes that did not exist at the time of making the covenant; for these were not then in contemplation. *L. Raym.* 319.

If no time is covenanted for doing of a thing, it must be done in reasonable time. *Wood.* *ibid.*

The remedy for breach of covenant is by *writ of covenant*, which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or shew good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which hath happened thereby, whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract. 3 *Black.* 155.

If a man lease for years, reserving a rent, an action of covenant lies for non-payment of the rent; for this is an agreement for payment of the rent, which will make a covenant. 1 *Roll's Abr.* 519.

On a covenant to pay money at several days, after the first default an action of covenant lies; otherwise it is of debt upon a bond or obligation. 1 *Inst.* 292.

COVENANT TO STAND SEISED TO USES, is, when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing under hand and seal agree, that for their or any of their provision or preferment, he and his heirs will stand seised of lands to their use, either in fee simple, fee tail, or for life. The use being created by the statute 27 *H. 8. c.* 10. which conveys the estate as the uses are directed, this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds are, natural affection, or marriage. And the law allows these considerations to raise uses, as well as money or other valuable consideration. *Plowd.* 302. So much of the use, as the owner doth not dispose of, remains still in him. And where an use is raised by way of covenant,

nant, the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him: but if they are not, the possession shall remain in him, until a lawful use arise, 1 *Leon.* 197. 1 *Mod.* 159.

COVERT BARON, a wife so called, from her being under the cover or protection of her husband, *baron*, or lord.

COVERTURE, is applied particularly to the state and condition of a married woman, or *feme covert*.

COVIN, *covina*, cometh of the French word *convine*, and is a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another. 1 *Inst.* 657.

It is commonly conversant in and about conveyances of lands to defeat purchasers, or of goods and chattels to defraud creditors. It may also be in suits of law, and judgment had therein; but wherever covin is, it shall never be intended, unless it appears and be particularly found: for covin and fraud, though proved, yet must be found by the jury, otherwise it shall pass for nothing. *Brownl.* 188. *Bridgm.* 112.

If goods are sold in market overt by covin, on purpose to bar him that hath right, this shall not bar him thereof. 2 *Inst.* 713.

COUNSEL FOR PRISONERS. By the common law, no counsel shall be allowed a prisoner, upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated, it being understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular. But now the judges never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact, for as to matters of law, arising on the trial, they are entitled to the assistance of counsel. 4 *Black.* 355.

COUNSELLOR, is a person retained by a client to plead his cause in a court of judicature. A *counsellor at law* hath a privilege to enforce any thing which is informed him by his client, if pertinent to the matter, and is not to examine

mine whether it be true or false ; for it is at the peril of him who informs him. *Gro. Jac. 90.*

COUNT, was a person of eminence, so called anciently from his *accompanying* or attending upon the king. The *earls* or governors of the shires had for some time this appellation given them ; hence the earl is in Latin styled *comes*, the sheriff *vice comes*, and the shire to this day retains the name of *county*.

Count signifies, in another sense, the original declaration of complaint in a real action. As *declaration* is applied to *personal*, so *count* is applicable to *real* causes. But *count* and *declaration* are oftentimes confounded, and made to signify the same thing. *F. N. B.* And in modern and common acceptation, every separate charge in a declaration or indictment is called a *count* ; so that a declaration or indictment may, and very frequently does, contain several counts.

COUNTERFEIT. See **CHEAT**.

COUNTERPART. Heretofore, where there were several parties to an indenture, each party executed a separate deed ; and that part or copy which is executed by the grantor is called the *original*, and the rest are *counterparts*. But of late, it is most frequent for all the parties to execute every part, and this makes them all originals. 2 *Black. 296.* If an original deed is in being, or may be had, the counterpart cannot be produced as evidence ; otherwise, if the original cannot by any means be procured. *Wood. b. 4. c. 4.*

COUNTERPLEA, is, when the tenant in any real action, tenant by the curtesy, or tenant in dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another who hath a larger estate, as of him in remainder or reversion ; or, where one that is a stranger to the action, comes and prays to be received to save his estate ; then, that which the demandant alledgeth against it, why it should not be admitted, is called a *counterplea*. *T. L.*

COUNTIES PALATINE, are those of *Chester*, *Durham*, and *Lancaster*. The two former are such by prescription or immemorial custom ; or at least as old as the Norman conquest : the other was created by king *Edward the third*, in favour of *Henry Plantagenet*, duke of *Lancaster*, whose heirs was married to *John of Gaunt*, the king's son. 1 *Black. 116.*

Counties palatine are so called a *palatio*, because the owners thereof, the earl of *Chester*, the bishop of *Durham*, and the duke of *Lancaster*, had in those counties *jura regalia*, as fully as the king hath in his *palace*. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, against the peace of our lord the king. These palatine privileges were in all probability originally granted to these counties because they bordered upon the enemies countries, *Wales* and *Scotland*; in order that the owners, being encouraged by so large an authority, might be the more watchful in its defence; and that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to hostile incursions. And upon this account also, there were formerly two other counties palatine, *Pembrokeshire* and *Hexhamshire*. But these were abolished by parliament, in the reigns of king *Hen. 8.* and queen *Eliz.* And the powers of the owners of the other counties palatine much abridged; though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them. *Id.* 117.

Of these three, the county of *Durham* is now the only one remaining in the hands of a subject; for the earldom of *Chester* was united to the crown by king *Hen. 3.* and hath ever since given title to the king's eldest son. And the county palatine or duchy of *Lancaster*, in the reign of king *Ed. 4.* was by act of parliament vested in the king and his heirs kings of *England* for ever. *Id.* 118.

The isle of *Ely* is not a county palatine, though sometimes erroneously so called, but only a royal franchise; the bishop having, by grant of king *Hen. 1.* *jura regalia* within the isle of *Ely*, whereby he exerciseth a jurisdiction over all causes, as well criminal as civil. *Id.* 119.

In all these, the king's ordinary writs, issuing under the great seal out of chancery, do not run, that is, they are of no force. For, as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves, and not by the crown. It would, therefore, be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. And the judges of assize, who sit within
these

these franchises, do sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of England. 3 Black. 79.

In the county palatine of *Lancaster*, there is also another special jurisdiction, called the court of the duchy chamber of *Lancaster*, held before the chancellor of the duchy or his deputy, concerning all matters of equity relating to lands holden of the king in right of the duchy of *Lancaster*; which is a thing very distinct from the county palatine (which hath also its separate chancery for sealing of writs, and the like), and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of *Westminster*. *Id.* 78.

A writ of error lies from all these jurisdictions to the court of king's bench. And all prerogative writs, as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*, may issue to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. *Id.* 79.

COUNTY, *comitatus*, is derived from *comes*, the count, who by the Saxons was called the *earl*, or *alderman*, of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vicecomes*, and in English the *sheriff*, or *shire-reeve*, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds; as *lathes* in *Kent*, and *rapes* in *Sussex*, each of them containing about three or four hundreds a piece. These had formerly their *lathe-reeves*, and *rape-reeves*, acting in subordination to the *shire-reeve*. Where a county is divided into three of these intermediate jurisdictions, they are called *trithings*, which were anciently governed by a *trithing-reeve*. These *trithings* still subsist in the large county of *York*, where, by an easy corruption, they are denominated *ridings*. The number of counties in *England* and *Wales* hath been different at different times: at present there are forty in *England* and twelve in *Wales*. 1 Black. 116.

COUNTY COURT, is a court held every month or oftener by the sheriff, in what part of the county he pleases:
but

but for the election of knights of the shire, it must be held at the most usual place. 1 *Black.* 178.

The jury in this court ought to be freeholders; but the *quantum* of their estate is not material.

This court is not a court of record; but it may hold plea of debt or damages under the value of 40s. It may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*, which is a writ empowering the sheriff, for the sake of dispatch, to do the same *justice* in his county court, as might otherwise be had in the courts at *Westminster*. 3 *Black.* 35.

But it cannot hold plea of freehold; as where a defendant avoweth for damage feasant, and the plaintiff justifies by reason of common of pasture; in which case the cause must be removed. *Wood. b. 4. c. 1.*

After judgment given for the plaintiff, the defendant's goods may be taken, appraised, and sold, to satisfy the plaintiff; but if the defendant hath no goods, the plaintiff remains without remedy in this court; for being no court of record, no *capias* lies to arrest the body of the debtor. *Greenw. 22.*

This court was anciently a court of great dignity and splendor, the bishop and the earl, with the principal gentlemen of the shire, sitting therein to administer justice both in lay and ecclesiastical causes. But its dignity was much impaired, when the bishop was prohibited, and the earl neglected to attend it. And in modern times, as the proceedings are removeable from hence into the king's superior courts, by writ of *pone* or *recordare*, this hath occasioned the business of the county court in a great measure to decline.

COURT, is a place where justice is judicially administered. 1 *Inst.* 58.

Of courts, some are *of record*, others *not of record*. A court *of record*, is that where the acts and judicial proceedings are enrolled in parchment, for a perpetual memorial and testimony; which rolls are called the *records* of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule, that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. And if the ex-
istence

istence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no, else there would be no end of disputes. All courts of record are the king's courts, in right of his crown and royal dignity; and therefore no other court hath authority to fine and imprison; so that the very erection of a new jurisdiction, with power of fine and imprisonment, makes it instantly a court of record. 3 *Black.* 24.

A court *not of record* is the court of a private person, whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts baron incident to every manor, and other inferior jurisdictions; where the proceedings are not inrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be *tried* and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s. nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant. *Id.* 25.

COURT BARON, is a court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor; for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail, as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost. 2 *Black.* 90.

The court baron is of two natures; the one is a customary court, appertaining intirely to the copyholders or other customary tenants; and of this the lord or his steward is the judge; the other is a court of common law, and is before the freeholders who owe suit and service to the manor, the steward being rather register than judge. These courts, though in their nature distinct, are frequently confounded together, although one of them may be without the other.

This court must be holden on some part of the manor; for if it be holden out of the manor it is void: unless a lord, being seised of two or three manors, hath usually time out of mind kept at one of his manors courts for all the said manors; then by custom such courts are sufficient in law, although they be not holden within the several manors. 1 *Inst.* 58.

The copyholders or customary court is for grants and admittances upon surrenders and descents, on presentment of

the homage or jury. The homage may inquire of the death of tenants after the last court, and who is the next heir; of fraudulent alienation of lands to defeat the lord of his profits; of rent or service withdrawn; of escheats and forfeitures; of cutting down trees without licence or consent; of suit not performed at the lord's mill; of waste by tenant for life; of surcharge of common; of trespass in corn, grass, meadow, woods, hedges; of rescous and pound breach; of removing mere-stones or landmarks; of by-laws not observed; and such like. The method of punishment is by amercement: but the steward cannot amerce without three assurers sworn to assere or moderate the amercement, and then the lord may have an action of debt in his court baron for amercements assered; for the suitors are judges there, and not the lord. *Wood. b. 4. c. 1.*

The freeholders court was formerly holden every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40*s.* *Id.*

Also a common recovery may be had in this court. *Id.*

But the proceeding on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt* (because it takes, *tollit*, the cause out of the lord's court). And the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the suit. After judgment given, a writ also of *false judgment* lies to the courts at *Westminster* to rehear and review the cause, and not a writ of error; for this is not a court of record. 3 *Black.* 33.

On recovery of debt in this court, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction shall be made. *Wood. b. 4. c. 1.*

COURT CHRISTIAN, is an ecclesiastical judicature opposed to the civil court, or lay tribunal; and is so called, as handling matters especially concerning the laws of *Christ*. 2 *Inst.* 488.

COURT OF DELEGATES. See **DELEGATES.**

COURT LEET. See **LEET.** So also of the other courts; as of *Marshalsea*, *Star-chamber*, and many others. See the respective titles.

CRANAGE,

CRANAGE, is a toll for drawing merchandize out of vessels to the wharf, so called because the instrument is in the form of a *crane*. 8 Co. 46.

CRAVEN was a word of obloquy, where, in the ancient trial by battel, the victory was proclaimed, and the vanquished acknowledged his fault in the audience of the people, or pronounced the horrible word *craven*, in the name of recreantise, or cowardliness; after which, judgment was to be given, that after this the recreant should lose his *liberam legem*, that is, he should become infamous, and not be accounted in that respect *liber et legalis homo*; and therefore could not be of any jury, nor give testimony as a witness in any cause. The word, according to some, is derived of the Greek word Κραυνη, a vociferation; others derive it from *craving* and crying for mercy and forgiveness. 2 Inst. 247. 3 Inst. 221. In the case of an *appeal*, if the *appellant* cries *craven*, he in like manner shall lose his *liberam legem*; but if the *appellee* cries *craven*, he shall have judgment to be hanged. 3 Inst. 221.

CREDITORS. By statute 30 C. 2. c. 7. creditors shall recover their debts against executors or administrators, who have wasted or converted the goods to their own use, as they might have done against the testator or intestate if he had been living.

And by 3 W. c. 14. wills and devises of lands, as to creditors on bonds or other specialties, shall be void; and the creditors may have actions of debt against the heir at law and devisee.

But an heir that hath lands by descent, shall not be liable for the debt of his ancestor, further than to the value of the lands descended. Str. 665.

And if an heir is sued upon a bond debt of his ancestor, and he pays the money, the executor shall reimburse him as far as there are personal assets of the testator come to the hands of the executor. 1 Cha. Ca. 74.

A creditor by mortgage may come either upon the mortgaged land, or upon the personal estate; for a mortgage is a charge upon the personal estate as well as upon the land; and the personal estate is primarily liable; for a mortgage is a general debt, and the land is only as a security. 1 Atk. 487.

And the general rule is, that the personalty shall be first charged with payment of debts, and the testator cannot ex-

empt it from being liable, as against creditors; but as between heir and executor, he may charge them upon any other fund which is not primarily liable, and thereby discharge the personal estate. 1 *Wilson*, 24.

CROSIER, the pastoral staff, or ensign, of the episcopal office; so denominated from its resembling the form of a *cross*. So *crosses* were pilgrims that wore the sign of the cross upon their garments.

CROSS BILL, is when the defendant in chancery hath any relief to pray against the plaintiff; in which case he must do it by an original bill of his own, which is called a *cross bill*; unto which the plaintiff will be required to put in his answer.

CROWN OFFICE. The court of king's bench is divided into the *plea* side, and the *crown* side. In the *plea* side, it takes cognizance of *civil* causes, in the *crown* side, it takes cognizance of *criminal* causes, and is thereupon called the *crown office*. In the crown office are exhibited informations in the name of the king, of which there are two kinds: 1. Those which are truly and properly the king's own suits, and filed *ex officio* by his own immediate officer, the attorney-general. 2. Those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and these are filed by the king's coroner and attorney, usually called the master of the crown office.

The objects of the king's own prosecutions, filed *ex officio* by the attorney-general, are properly such enormities as peculiarly tend to disturb or indanger his government, or to molest him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention whereof a moment's delay might be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. The objects of the other species of informations, filed by the master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney-general), but which, on account of their magnitude

nitude or pernicious example, deserve the most public animadversion.

And when an information is filed, either thus, or *ex officio*, it must be tried by a petty jury of the county where the offence arises; after which, if the defendant be found guilty, he must resort to the court for his punishment. 4 Black. 308.

CUCKING STOOL (called in ancient time a *tumbrel*, and sometimes a *trebucket*), signifies, in *Saxon*, the scolding stool; and is an engine of correction for a scolding woman after conviction upon indictment for such offence, in which she is placed and plunged in the water: From whence it is also called the *ducking stool*, which perhaps is the original word, being more expressive of the thing signified.

CUI IN VITA, is a writ of entry, which a widow hath against him to whom her husband alienated her lands or tenements in his life time; which must contain in it, that during his life (*cui in vita*) she could not withstand it. F. N. B.

CULPRIT, is not (as is vulgarly imagined) an opprobrious name given to the prisoner before he is found guilty, but it is the reply of the clerk of arraigns to the prisoner after he hath pleaded not guilty; which plea was anciently entered upon the minutes in an abbreviated form, *non cul*; upon which, the clerk of arraigns, on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so; which is done by a like kind of abbreviation, *cul'prit*, signifying that the king is ready to prove him guilty (from *cul*, that is, *culpabilis*, guilty; & *prit*, *præsto sum*, I am ready to verify it). 4 Black. 339.

CURATE. Of curates there are three kinds: 1. Such as are employed under the spiritual rector or vicar, either as assistant to him in the same church, or executing the office in his absence in his parish church. 2. Such as officiate in chapels of ease under the mother church. 3. Perpetual curates; which are, where there is in a parish neither spiritual rector nor vicar, but a clerk is employed to officiate there by the impropriator.

CURFEU (from the Fr. *couvre*, to cover, and *feu*, fire), was an institution of William the Conqueror, who required,

by ringing of a bell at eight of the clock every evening, that all companies should immediately disperse, and fire and candle be extinguished. It is remarkable that this ringing of the bell at that hour still continues in many places, though the original institution hath been long since forgotten.

CURRIER. By the 24 G. 3. c. 41. every currier or dresser of hides in oil, shall take out a licence annually from the commissioners or officers of excise.

CURTESY, tenant by.

TENANT BY THE CURTESY OF ENGLAND, is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the issue afterwards dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the curtesy of England. *Litt. sec. 35.*

By the curtesy of England. Littleton says, it is so called, because it is used within the realm of England only. But it appears to have been the law of Scotland also, wherein it was called *curialitas*; so that probably our word *curtesy* was understood to signify, that the husband, during his life, should be inrolled and do suit and service in the lord's court, for the lands of which his wife died seised, rather than to denote any peculiar favour belonging to this island. 2 *Black. 126.* And indeed there seems to be no great courtesy in the matter, that the legislators, who were all, or most of them, married men (especially during the times that the law of wardship and marriage existed), should make a law for their own advantage, to disinherit the heir of the wife's estate, during the life-time of her surviving husband. This curtesy of England is in the Latin called *lex Angliae*, the law of England.

Taketh a wife seised. There is a seisin *in deed*, where one hath made entry, and is in actual possession; and a seisin *in law*, where a person hath right, but hath not actually made entry. It is the former of these that is here intended, namely, a seisin *in deed*, if it may be attained unto. 1 *Inst. 29.*

As if a man dieth seised of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy; and yet in this case she had a seisin *in law*; but if she or her husband had during her life entered, he would have been tenant by the curtesy. 1 *Inst. 29.*

But

But if a man seised of an advowson, or rent in fee, hath issue a daughter, who is married, and hath issue, and dieth seised, and the wife before the rent became due or the church became void dieth; she had but a seisin *in law*, yet her husband shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Ibid.*

So in the case where lands, on which there were leases for years existing, and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day incurred; though she made no entry, nor received any rent, during her life, yet this was such a possession in the wife, as made the husband tenant by the curtesy: for the possession of the lessee was the possession of the wife, and there could be no other without making the husband a trespassor. 3 *Atk.* 469.

But a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture. 1 *Inst.* 29.

In fee simple, or in fee tail general, or seised as heir in special tail. That is, of any estate of inheritance. 2 *Black.* 126.

If a woman seised in fee of a freehold estate, mortgages it, and afterwards marries, and dies leaving a son, the mortgage having not been redeemed during the coverture, this is such a seisin in the wife, as intitles the husband to be tenant by the curtesy of the mortgaged premises; for, in equity, the land is considered only as a pledge or security for the money, and doth not alter the possession of the mortgagor. 1 *Atk.* 603.

An equity of redemption hath been always considered as an estate in the land; for it may be devised, granted, or intailed, with remainders: and the person intitled to the equity of redemption is considered as the owner of the land, and is such an estate whereof there may be a seisin. 1 *Atk.* 605.

In the case of a trust estate for payment of debts, a husband may be tenant by the curtesy. 1 *Atk.* 609.

But where a devise was to trustees, and they to apply the rents and profits to the devisor's daughter and heir, who was a feme covert, for her own separate use, and to suffer her to dispose of the estate by will, notwithstanding her coverture; in this case it was held, that the whole legal estate was in the trustees; and although a husband may be tenant by the curtesy of a trust, yet, in order to make a tenant by

the curtesy, the wife must have the inheritance, and there must be likewise a seisin in deed in the wife during the coverture; and although in this case the wife had the inheritance, because it descended till the execution of the power, yet the father, whose estate it was, made the daughter a feme sole in this respect, and gave the profits to her separate use; therefore the husband could have no seisin during the coverture; he could neither come at the possession, nor the profits. 3 *Atk.* 716.

Where the wife hath an estate *for life* only, there the husband shall not be tenant by the curtesy. 1 *Atk.* 607.

There is no tenancy by the curtesy of *copyhold* lands, except it be by the special custom of the manor. *Plowd.* 263.

And hath issue, male or female. If lands be given in tail to a woman and to the heirs *male* of her body, and she taketh a husband, and hath issue a *daughter*, and dieth; in this case, the husband shall not be tenant by the curtesy; because the daughter by no possibility could inherit the mother's estate in the land; and therefore where it is said, *issue by his wife male or female*, it is to be understood, which by possibility may inherit as heir to her mother of such estate. 1 *Inst.* 29.

If a man, seised of lands in fee, hath issue a daughter, who taketh husband, and hath issue to her said husband, the father dieth, and the husband entereth; he shall be tenant by the curtesy, although the issue was had before the wife was seised. And so it is, although the issue had died in the life-time of her father before any descent of the land, yet shall he be tenant by the curtesy. *Ibid.*

For the time when the issue is born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband, by the birth of the child, becomes tenant by the curtesy initiate, and may do many acts to charge the lands; but his estate is not consummate till the death of the wife. 2 *Black.* 127.

Born alive. If a woman seised of lands in fee taketh husband, and by him is big with child, and in her travail dieth, and afterwards the child is ripped out of her body alive; yet he shall not be tenant by the curtesy, because
the

the child was not born during the marriage, nor in the lifetime of the wife, but in the mean time the land descended; and in pleading he must allege, that he had issue during the marriage. 1 *Inst.* 29.

If the child be born alive, it is sufficient though it be not heard to cry; for though crying is the strongest evidence of its being born alive, yet it is not the only evidence. *Ibid.*

The husband shall hold the lands during his life. Subject to the same incidents as other life estates. He shall have reasonable estovers of housebote, ploughbote, and haybote; but shall not cut down timber, or commit other waste. And if he sows the land, and dies before harvest, his executors shall have the crop. 2 *Black.* 122.

If there is a mortgage upon the estate, the heir at law may oblige the tenant by curtesy to keep down the interest; and if the principal shall be discharged, the tenant by curtesy shall contribute one third, and the heir at law two thirds. 1 *Atk.* 606. 3 *Atk.* 201.

CURTILAGE (from the Saxon, *court*, and *leagh*, locus), a court yard, backside, or piece of ground, lying near and belonging to an house.

CUSTOM time out of mind is, where no person living hath heard or known any proof to the contrary.

There is a difference between *custom* and *prescription*; *custom*, is properly *local* usage, and not annexed to any *person*; such as a custom in a manor, that lands shall descend to the youngest son: *prescription*, is merely a *personal* usage; as, that such a one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege; as to have common of pasture in such a close, or the like; for this is an usage annexed to the *person* of the owner of the estate. 2 *Black.* 263.

To make a custom good, the following are necessary requisites:

1. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason, no custom can prevail against an act of parliament; since the act itself is a proof of a time when such a custom did not exist. 1 *Black.* 76.

2. It

2. It must have been continued. Any interruption would cause a temporary ceasing; the revival gives it a new beginning, which will be what the law calls within time of memory: Now time of memory hath been long ago ascertained by the law, to commence from the reign of King *Richard* the first; and any custom may be destroyed by evidence of its non-existence in any part of that long period from his days to the present. 2 *Black.* 31.

3. It must have been peaceable, and acquiesced in; not Subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting. 1 *Black.* 77.

4. It must not be unreasonable. Thus a custom in a parish that no man shall put his beasts into the common till such a day, is good; but a custom that no cattle shall be put in till the lord of the manor hath first put in his, is bad, because unreasonable; for possibly the lord may never put in his, and thereby the tenants will lose all the profits. *Id.*

5. It must be certain. A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. *Id.* 78.

6. Customs must be consistent with each other; for one custom cannot be set up in opposition to another. So if one man prescribes that by custom he hath a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows; for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. *Id.*

7. Customs, in derogation of the common law, must be construed strictly. Thus by the custom of gavelkind, an infant of fifteen years may by a deed of feoffment convey his lands in fee simple or for ever: but this custom doth not empower him to use any other conveyance, or even to lease them for a term of years; for the custom must be strictly pursued. 1 *Black.* 79.

A jury shall try whether there is a particular custom or no, and not the judges; unless the custom in question is of record in the same court.

If

If witnesses can depose that they heard their fathers say it was a custom all their time, and that their fathers had heard their grandfathers say it was so also in their time, this is evidence of a custom : but proof of a time when this custom did not exist, destroys all this kind of evidence.

CUSTOMS, are the duties, toll, or tribute, payable on merchandize exported or imported.

The word *customs* seems to be derived from the *French* word *coustum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, damage, or, as we have adopted it in English, *cost*.
1 Black. 314.

The ancient duties on wool, skins, and leather, were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those parts where the king's staple was established, in order to be there first rated, and then exported. And they were called *customa antiqua five magna*; and were payable by every merchant as well native as stranger; with this difference, that merchant strangers paid an additional toll, namely, half as much again as was paid by natives. *Id.*

The *customa parva et nova*, was an impost of 3*d.* in the pound, due from merchant strangers only, for all commodities as well imported as exported; which was usually called the aliens duty. *Id.*

Tonnage is a duty on wines imported, at so much a *tun*; *poundage*, a duty *ad volorem*, on all other merchandize at so much a pound. *Id.* 315.

CUSTOS ROTULORUM, is he that hath the custody of the rolls or records of the sessions of the peace. He is the principal justice of the peace within his county, and is usually some person of fortune or quality. He is appointed by the king under his sign manual, and hath power to appoint the clerk of the peace.

CYDER AND PERRY. By the 27 G. 3. c. 13. certain excise duties are imposed on all cyder and perry made and sold in *Great Britain*, according to a schedule annexed to the act.

And by the annual malt act, a further duty is to be paid for all cyder and perry made in *Great Britain*, and sold by retail, the amount of both which duties is ascertained and limited by 29 G. 3. c. 10.

D A M

DAMAGE FEASANT (doing damage), is where the beasts of another come upon a man's land, and do there feed, tread, or spoil, his corn or grafs there growing; in which case, the owner of the ground may distrain and impound them till satisfaction be made. *Wood. b. 4. c. 4.*

But the owner may tender amends before the cattle are impounded; and then the detainer is unlawful. Also if, when impounded, the pound door is unlocked, the owner may take them out. *Wood. b. 2. c. 2.*

If ten head of cattle be doing damage, a man cannot take one of them and keep it till he is satisfied for the whole damage. *12 Mod. 600.*

If a man come to distrain, and see the beasts in his ground, and the owner chase them out, of purpose, before the distress taken; yet the owner of the soil cannot distrain them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distress. *1 Inst. 161.*

For distress damage feasant is the strictest distress that is; and the thing distrained must be taken in the very act; for if the goods are once off, though on fresh pursuit, the owner of the ground cannot take them. *12 Mod. 661.*

For a rent or service, a man cannot distrain but in the day time; but for damage feasant, one may distrain in the night; otherwise the beasts may be gone before he can take them. *1 Inst. 142.*

DAMAGES are the recompence that is given to a man, by a jury, as a satisfaction for some injury sustained; as for a battery, imprisonment, slander, or trespass. *2 Black. 438.*

In actions upon the case, the jury may find less damages than the plaintiff lays in his declaration, though they cannot find more: but costs may be increased beyond the sum mentioned in the declaration for damages; for costs are given in respect of the plaintiff's suit to recover his damages, which may be sometimes greater than the damage. *10 Co. 115.*

When a statute doth increase damages to the double or treble value, where damages were given before, there the plaintiff shall recover those damages only, and no costs. For example, in an action upon the statute of forcible entry,

entry, 8 *Hen. 6.* which gives treble damages; in this case, the plaintiff shall recover his damages and his costs to the treble, because he should have recovered single damages at the common law, and the statute increases them to treble: but upon the statute of 1 & 2 *P. & M.* for chasing distresses out of the hundred, whereby treble damages are given, the plaintiff shall recover no costs, because this action and penalty are newly given, and were not at the common law. 2 *Inst.* 289. 10 *Co.* 115.

So in an action upon the case, on the 2 *W. sess. 1. c. 5.* for a rescous of distress, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, an action upon the case lying for a rescous at common law. 1 *Salk.* 205.

Sometimes, in order to save charges, the defendant suffers judgment to go against him by default; and in this case, unless he will confess the whole damages laid in the declaration, a jury must be called in to assess them. Whereupon the sheriff is commanded to summon a jury to inquire of the said damages, and return their inquisition when taken into court. This process is called a *writ of inquiry*, in the execution whereof the sheriff presides as judge, and tries by the jury, in like manner as a trial at nisi prius, what damages the plaintiff hath really sustained. And when this is returned with the inquisition, judgment is thereupon entered. 3 *Black.* 397.

DANEGLT, a tax or tribute imposed when the *Danes* got footing in this land. Some say it was imposed by the *Danes* in support of their authority; others say, that it was a tax levied to keep them out: and perhaps, at different times, it might be levied in both those respects.

DANE-LAGE, the *Danish law*, was brought into *England* upon the eruption of the *Danes*, and prevailed in those parts where the *Danes* had obtained a settlement, especially in several of the midland counties, and on the eastern coast, being that part which was most exposed to the visits of that piratical people. 1 *Black.* 65.

DAPIFER (from *dapes ferendo*), a purveyor, or steward, of the household.

DARREIN PRESENTMENT (the *last presentment*), is a writ which lies, where a man or his ancestor hath presented
a clerk

a clerk to a church, and afterwards (the church becoming void by the death of the said clerk or otherwise) a stranger presenteth his clerk to the same church, in disturbance of him who had last, or whose ancestor had last, presented. *T. L.*

But now this kind of writ is totally disused; the remedy by *quare impedit* being much more effectual, for a *darrein presentment* lies only where a man hath an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase. 3 *Black.* 246.

DATE (*datum*); of a deed, denotes the time of the deed being given or executed, either expressly, or by reference to some day and year mentioned in the deed before. 2 *Black.* 304.

Yet a deed is good, although it mention no date, or hath a false date, or even if it hath an impossible date, as the 30th of *February*, provided the real day of its being dated or given, that is, *delivered*, can be proved. *Id.*

Every deed shall be intended to be delivered on the same day that it bears date, unless the contrary be proved. 2 *Inst.* 674.

If a lease be made by indenture, bearing date the 26th of *May*, to have and to hold for 21 years *from the date*, or *from the day of the date*, it shall begin on the 27th. 1 *Inst.* 46.

If the lease bear date the 26th of *May*, to have and to hold *from the making thereof*, or *from thenceforth*, it shall begin on the day on which it is delivered, for until delivery it hath no effect; but if it be *from the day of the making thereof*, then it shall begin on the next day after the delivery. *Id.*

If in the date of a deed the year of our Lord is right, though the year of the king's reign be mistaken, this shall not vitiate the deed. *Cro. Ja.* 261.

On an action of covenant, the plaintiff declared on a deed bearing date the 30th of *March in the year of our Lord 1701*, and in the 13th year of the reign of the king; whereas, on producing the deed, it appeared to be only dated thus, *the 30th of March 1701* (wanting the words *in the year of our Lord*); and likewise, *in the 13th year of the king* (wanting the words *of the reign*): On demurrer, the court held this to be no variance, for that it was in the deed implicitly. 2 *Salk.* 658.

If a deed is dated at four o'clock in the afternoon of such a day, the whole day is to be taken in: for the law in this computation rejects all fractions and divisions of a day, for the uncertainty. 5 Co. 1.

DAY, is either *natural*, or *artificial*. The *natural* day consists of 24 hours, and contains the day solar, and the night, being that space in which the sun is supposed to go from east to west, and from the west again to the east. The *artificial* or solar day begins at sunrise and ends at the sunsetting.

In order to avoid disputes, the law generally rejects all fractions of a day. Therefore if I am bound to pay money on any certain day, I discharge the obligation if I pay it before 12 o'clock at night; after which the following day commences. 2 Black. 141.

If an offence be committed in the night, the indictment must set forth that it was done in the night of the same day.

Day in legal proceedings is the day of appearance of the parties, or continuance of a suit, where a day is given. And when the party is finally dismissed the court, he is said to be put without day.

In case of notice to be given such a determinate number of days beforehand, as for instance 14 days, the usual way of computing is not to include nor exclude both the first and last of those days, but one of them only: so in the case of returns to writs of *mandamus* and *scire facias*, where the rule is, that there must be 15 days between the teste and return, these in practice are only 14, one of the first or last being always included. Burr. Mansf. 2525.

But the courts vary a little in practice; for all days where-in rules to plead, reply, &c. are given, are exclusive in the *king's bench*, and inclusive in the *common pleas*, unless by order of court or judge

DAYS IN BANK, are days of appearance in the court of common pleas, called usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis* or the court of king's bench. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some of these days in bank, all original writs must

must be made returnable, and therefore they are generally called the *returns* of that term. 3 *Black.* 277.

DAYWERE of land, perhaps by mistake for *daywere* (day's work), as much arable land as can be ploughed up in one day's work, or one *journey* (as the farmers still call it). Hence an artificer, who assists a master workman in daily labour, is called a *journeyman*.

DEACON. By the canons of the church, none shall be ordained deacon unless he is twenty-three years of age. Anciently, his office was to officiate under the minister in making responses, and repeating the confession, the creed, and the Lord's prayer after him, and such other duties as now properly belong to our parish clerks: but now it seemeth that he may perform any of the divine offices which a priest may do, except only pronouncing the absolution and consecrating the sacrament of the Lord's supper.

DEADLY FEUD, in *Scotland*, is a combination of kindred to revenge injuries or affronts done or offered to any of their blood, till a person is revenged even by the death of his adversary.

DEAN, is an ecclesiastical governor secular over the prebendaries and canons in the cathedral church, who were originally the council of the bishop, to assist him with their advice in affairs of religion; and also in the temporal concerns of his see. When the rest of the clergy were settled in the several parishes of each diocese, these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or *dean*, being probably at first appointed to superintend ten canons or prebendaries. 1 *Black.* 382.

The deans of the old foundation (which are those that were established before the reign of king *Henry* the eighth) are elected by the chapter, by *conge d'eslire* of the king, and letters missive of recommendation, in the same manner as bishops: but deans of the new foundation, that is, in those chapters which were founded by king *Henry* the eighth out of the spoils of the dissolved monasteries, the deanry is donative, and the installation merely by the king's letters patent.

patent. The *chapter*, consisting of canons or prebendaries, are in some places appointed by the king, in others by the bishop; and in some places they are elected by each other. *Id.*

Besides the cathedral deans, who preside at the head of the chapter, there are three other sorts of deans: First, a dean *without a chapter*, and yet he is *presentative*, and hath cure of souls; he hath a peculiar, and a court wherein he holds ecclesiastical jurisdiction; and is not subject to the visitation of the ordinary; such is the deanry of *Battel* in *Suffex*, which deanry was founded by *William* the conqueror in memory of his conquest. Secondly, a dean, not presentative, but *donative*, and who hath not the cure of souls; he also hath a court and a peculiar, which often extends over many parishes; such is the dean of the *Arches*, the dean of *Bocking* in *Essex*, and many more. Thirdly, the *dean rural*; having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanry and precinct, by direction of the bishop or archdeacon: but this office is now almost totally laid aside.

DEATH OF PERSONS. There is a *natural* death of a man, and a *civil* death; natural, when nature itself expires and extinguishes; and civil, is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. If any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent *seven* years, and no proof made of his being alive, such person shall be accounted naturally dead; though if, afterwards proved to be living at the time of eviction of any person, then the tenant, &c. may re-enter, and recover the profits. 19 C. 2. c. 6.

DEATH'S PART, or *deadman's part*, is that portion of his personal estate which remained after his wife and children had received thereout their respective reasonable parts: which was, if he had both a wife and a child, or children, one third part; if a wife and no child, or a child or children and no wife, one half; if neither wife nor child, he had the whole to dispose of by his last will and testament; and if he made no will, the same was to go to his administrator. And within the city of *London*, and throughout the province of *York*, at this day, in case of intestacy, the wife and children

dren are intitled to their said reasonable parts, and the residue only is distributable by the statute of distribution.

DE BENE ESSE. To take or do any thing *de bene esse* is in law signification to accept or allow it as *well* done for the present; as where witnesses are aged, or sick, or going beyond sea, whereby the party thinks he is in danger of losing their testimony, a court of equity, upon motion, will order them to be examined *de bene esse*; so as to be valid if the party hath not an opportunity of examining them afterwards: but if they are alive, and well, or return, these depositions are not to be of force, but the witnesses must be examined again. 3 *Black.* 383

So also at common law, the judges frequently take bail, and declarations are frequently delivered *de bene esse* (or conditionally); for which see the books of practice.

DEBET ET DETINET: In an action of debt, the form of the writ is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant *owes*, and unjustly *detains*, the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt; as by the obligee against the obligor, the landlord against the tenant, or the like. But if it be brought by or against an executor for a duty to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, for corn, or an horse, the writ shall be in the *detinet* only; for it cannot properly be said that the defendant *owes* to the plaintiff an horse, but only that he *detains* him. 3 *Black.* 155.

DEBET ET SOLET are formal words made use of in writs, sometimes one only, and sometimes both. Thus if a man sues to recover any right, whereof his ancestor was disseised by the defendant or his ancestor, there he useth the word *debet* alone in his writ, because his ancestor only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth *debet et solet*, by reason that his ancestor before him, and he himself,

self, *usually* enjoyed the thing sued for, until the present refusal of the defendant. So the writ of suit to a mill, is a writ of right in the *debet* and *folet*. F. N. B.

DEBT, *action of*, in a legal acceptation, is a sum of money due by certain and express agreement. As, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease: where the quantity is fixed and unalterable, and doth not depend upon any after calculation to settle it. 3 *Black*. 153.

The non-payment of these is an injury, for which the proper remedy is by *action of debt*, to compel the performance of the contract, and recover the specific sum due. *Id*.

And this is the shortest and surest remedy; particularly where the debt arises upon a specialty; that is, upon a deed, or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of the contract. 3 *Black*. 154.

And, indeed, actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for in case of such an action upon a simple contract, the plaintiff labours under two difficulties; first, the defendant has here the same advantage as in an action of detinue, that of waging his law, namely, purging himself of the debt by oath, if he thinks proper; secondly, in an action of debt, the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action, fixed and determined; but in an action upon the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance; these damages are in their nature indeterminate, and will therefore adapt and proportion themselves to the truth of the case, which shall be proved, without being confined to the precise demand stated in the declaration. *Id*.

DEBTS, priority of. See PRIORITY.

DECETALLES, is when a full jury doth not appear on a trial at bar, then a writ goes to the sheriff to return *ten such*

as the other jurors; out of whom to supply the number wanted.

DECENNARY (from *decem*, ten), was originally a district of ten men with their families. King *Alfred*, for the better preservation of the peace, divided the kingdom into counties, the counties into hundreds, and the hundreds into tythings or decennaries; the inhabitants whereof, living together, were sureties or pledges for each other's good behaviour. One of the principal of which number presided over the rest, and was called the chief pledge, borsholder, borow's elder, or tythingman; all which appellations in process of time were changed into that of constable.

DECLARATION, is a setting forth in writing the demand or complaint of the demandant or plaintiff against the tenant or defendant, who is supposed to have done the wrong. The original *writ*, according to its name *breve*, is brief and short; but the *declaration*, or count, which the demandant or plaintiff maketh, is more narrative, spacious, and certain, both in matter and in circumstance of time and place, to the end the defendant may be compelled to make a more direct answer. 1 *Inst.* 17.

It is usual in actions upon the case to set forth several cases, by different counts in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As in an action upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant, as that they bargained for 20*l.*; and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth, and then avers that they were worth other 20*l.*; and so on, in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfil any of these agreements; whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fail in the rest, he shall recover proportionable damages. 3 *Black.* 295.

DECREE, is the judgment of a court of equity, on any bill preferred. It is either *interlocutory*, or *final*. It seldom happens

happens that the first decree can be final; for if any matter of fact arise which is strongly controverted, the court usually directs the same to be tried at law by a jury, as in case of the validity of a will, or the existence of a modus in lieu of tithes. So if a question of law arises, as whether by the words of a will an estate for life or in tail is created, it is usual to refer this to the opinion of the judges of the court of king's bench or common pleas. So likewise there are often long accounts to be settled, incumbrances and debts to be inquired into, and many other facts to be cleared up, before a final decree can be made; and these are usually referred to be settled by a master in chancery. After all which, then the cause is again brought to hearing upon the matter of equity reserved, whereupon a *final* decree is then pronounced. 3 *Black.* 452.

DEDIMUS POTESTATEM, is a writ to commission private persons to do some act in the place of a judge; as to administer the oath of office to a justice of the peace, to take a personal answer to a bill in chancery, to examine witnesses, to levy a fine, to take a recovery, and such like. *F. N. B.*

A DEED, is an instrument in writing, comprehending a bargain or contract between party and party. 1 *Inst.* 171.

The writing must be on *paper* or *parchment*; and not upon wood, leather, cloth, or the like; because upon these it is more liable to be altered or corrupted. 1 *Inst.* 35.

If it be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and each should be cut and indented, to tally and correspond with the other; which deed, so made, is called an *indenture*. 2 *Blackst.* 295.

A deed made by one party only is not indented, but polled or shaved quite even; and is therefore called a *deed poll*, or single deed. *Ibid.*

A deed *indented* is executed by, and binds the several parties; a *deed poll* is executed by one party, and only binds him who made it. *Litt. sect.* 370.

If a deed beginneth, *This indenture*, and in truth the parchment or paper is not indented, this is no indenture; because words cannot make it indented: but if the deed be actually indented, and there be no words of indenture in

the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

1 *Inst.* 229.

In every deed there must be a *consideration*. For a deed or other grant, made without any consideration, is construed to enure only to the use of the grantor himself.

2 *Blackst.* 296.

Consideration may be either a *good*, or a *valuable*, consideration: a *good* consideration is such as that of blood or natural affection; when a man grants an estate to a near kinsman: a *valuable* consideration is such as money, marriage, or the like; which the law deems an equivalent given for the grant. *Ibid.*

Where any consideration is mentioned in a deed, as of *love and affection* only, if it is not also for *other considerations*, a man cannot enter into the proof of any other: the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative of any other. 1 *Vez.* 128.

The *habendum* in a deed is to express the certainty of the estate which the party is to have, for what time, and to what use. It cannot lessen the estate granted in the premises, but may enlarge it; as if a man grant lands to one and his heirs, to have and to hold to him and the heirs of his body, the *habendum* is void; for the larger and more beneficial estate is vested in him, before the *habendum* comes.

2 *Black.* 298.

The *tenendum* is now of little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was to be holden, as to hold by knight's service, in burgage, in free socage, and the like. But all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores terrarum*, it was sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath also been antiquated; though for a long time after, we find it mentioned in ancient charters, that the tenements shall be holden of the chief lords of the fee; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use. *Ibid.*

The

The *reddendum*, or render, in a deed, is a reservation whereby the grantor doth create or reserve something to himself, out of what he had before granted. But if it be of ancient services, or the like, annexed to the land, then the reservation may be to the lord of the fee. 2 *Black.* 299.

Where a feoffor conveys away all his estate in the land absolutely, and is not bound to warrant the land, or defend the title, but the feoffee is to defend the land at his peril; the feoffee shall have all the *title deeds* and evidences as incident to the land, although they be not granted by express words; for the feoffor cannot reap any benefit by them; but if the feoffor warrants the land, there, without express grant, the feoffee shall not have any deeds which do comprehend warranty, but the feoffor shall have all the evidences which are requisite to defend the title of the land; and the feoffee must trust to his warranty. But otherwise it is, where there is an express grant of the deeds and evidences. 1 *Co.* 1, 2. 1 *Inst.* 6.

A deed is void by *rafure*, or *interlining*, in any material part, unless a memorandum be made thereof at the time of execution and attestation; and anciently, the judges determined this upon their own view; but of later time, they have left that to the jurors, to try whether the rasing or interlining were before delivery. 1 *Inst.* 225. 2 *Black.* 308.

Our *Saxon* ancestors, as many of them as could write, *signed* their names; and whether they could write or not, affixed the sign of the cross. The *Normans* that succeeded, few of whom could write, used the practice of *sealing* only, without writing their names. And this practice of *sealing*, without *signing*, continued very long, and was held sufficient to authenticate a deed; and so the common form of attesting deeds "sealed and delivered" continues to this day; although the statute of 29 *C.* 2. *c.* 3. expressly requires *signing* in all grants of lands and many other species of deeds; in which therefore now *signing* seems as necessary as *sealing*. 2 *Black.* 306.

But on an issue directed out of chancery, whether there was a devise or not, *Raymond* chief justice ruled, that *sealing* a will is a *signing* within the statute. *Str.* 764. *B. E. L.* 522.

The *date* of a deed was of ancient time frequently omitted; and the reason was, for that the limitation of prescription, or time of memory, did often in process of time vary: and the law was then holden, that a deed, bearing date before the limited time of prescription, was not pleadable, and

therefore they made their deeds without date, to the end they might allege them within the time of prescription. And the date of the deeds was commonly added in the reign of *Ed. 2.* & *Ed. 3.* and so ever since. 1 *Inst.* 6.

But a deed is good although it mention no date, or hath a false date, or even if it hath an impossible date, as the 30th of February; provided the real date of its being dated or given, that is, *delivered*, can be proved. 2 *Black.* 304.

For the day of the *delivery* of a deed is the day of the date, though there be no date set forth: and if a deed bears date one day, and is delivered on another day, the day of delivery is the day of the date. 1 *Salk.* 76.

The words "from the *day* of the date" exclude the day of the date; but "from the date" is from the act done; and so commences the same day that it is dated or delivered. *L. Raym.* 480.

A deed *lost* may be proved by circumstances; first shewing that it once existed; and next, that it was lost, or cannot be come at. 1 *Verz.* 389.

The loss of a deed is not always a ground to go into a court of equity for relief; for courts of law admit evidence of the loss of a deed, proving the existence of it, and the contents, just as a court of equity does. Otherwise it is of a *bond*; for of that, a profert must be made in court. 1 *Verz.* 392. 3 *Atk.* 214.

DEED-POLL, is a deed *polled* or shaved quite even, in contradistinction from an *indenture*, which is cut unevenly, and answerable to another writing that comprehends the same words. A *deed-poll* is properly single, and but of one part, and is intended for the use of the feoffee, grantee, or lessee; an *indenture* always consists of two or more parts and parties. Every deed that is pleaded shall be intended to be a *deed-poll*, unless it is alleged to be indented. It commonly begins thus: *To all people to whom these presents shall come: or, Know all men by these presents.* 1 *Inst.* 229.

DEEMSTERS (Sax. *deem*, *doom*, judgment), is the name for judges in the Isle of Man.

DEER. By the 16 G. 3. c. 30. hunting, or attempting to hunt, any deer incurs a forfeiture of 20*l.* and actually killing the same incurs the forfeiture of 30*l.*; and in either case,

case, the penalty for a second offence is transportation for seven years. But by the *Black Act*, 9 G. c. 22. deer-stealing, in certain cases, is made felony without benefit of clergy.

DEER HAY, an engine or great net made of strong cords, wherein to take deer.

DE FACTO, signifies a thing actually done. A king *de facto* is understood to be one that is in actual possession of the crown, and hath no lawful title to it; in which sense it is opposed to a king *de jure*, who hath right to the crown, but is out of possession. 3 *Inst.* 7.

DEFAMATION. See SLANDER.

DEFAULT, is commonly taken for non-appearance in court, at a day assigned; though it extends to any omission of that which we ought to do. 1 *Inst.* 259.

Where the defendant makes default at nisi prius, he is out of court to all purposes but this, *viz.* that judgment may be given against him; therefore no repleader can be awarded. 1 *Salk.* 216.

In an action of debt upon bond; if the defendant pleads a release, and issue is thereupon joined, if at the trial the defendant makes default, the plaintiff may pray judgment by default; because by the plea the duty is confessed, and therefore no inquest need be taken by default: but if the defendant plead *non est factum*, by that plea the duty is denied; and therefore if he makes default, inquest must be taken by default. *Id.*

Before a verdict is taken by default, the cryer of the court calls the defendant three times, to shew if he hath any challenge to the jurors; and if he doth not appear upon the cryer's calling, then the *capiatur* by default is indorsed on the back of the panel. 1 *Lill. Abr.* 425.

In criminal cases, if an offender being indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes default; here the inquest, in case of felony, shall never be taken by default, but a *capias ad audiendam juratam* shall issue; and if the party is not taken, an *exigent*. And if he appeared on that writ, and then made default, a new *exigent* may be granted.

If

If jurors make default in their appearance for trying of causes, they shall forfeit their issues, unless reasonable cause be proved to the satisfaction of the court.

DEFEAZANCE, from the French *defaire*, to undo, or defeat, is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which, the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void, on repayment of the money at a certain day. 2 *Black.* 327.

In like manner there is a defeazance of a bond, or recognizance, or judgment recovered; which is a condition that, when performed, defeats or undoes it, in the same manner as a defeazance of an estate. *Id.* 342.

The difference between a condition and a defeazance is, that the condition is inserted in the deed, and a defeazance is usually a deed by itself, relating to another deed. *Wood. b. 2. c. 3.*

There is a diversity between inheritances *executed*, and inheritances *executory*; as lands *executed* by livery cannot by indenture of defeazance be defeated afterwards; and so if a disseisee release a disseisor, it cannot be defeated by indentures of defeazance made afterwards: but at the time of the release or feoffment, the same may be defeated by indentures of defeazance. But rents, annuities, conditions, warranties, and such like, that are inheritances *executory*, may be defeated by defeazances made either at that time, or at any time after: and so the law is, of statutes, recognizances, obligations, and other things *executory*. 1 *Inst.* 236.

DEFENCE, in legal understanding, doth not signify a justification, protection, or guard, which is its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the declaration. It is the *contestatio litis* of the civilians; a general assertion that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. The courts were formerly very nice and curious with respect to the nature

ture of the defence; so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment. And to every kind of count they had a several kind of defence. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury, the defendant waved all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behove him, he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced; though they still seem to be law, if insisted on. 3 *Black.* 296.

DEFENDANT, is the party that is sued in a *personal* action; as *tenant* is he that is sued in an action *real*.

DEFENDER OF THE FAITH, a title given by the pope to king *Henry* the eighth, for writing against *Luther*; which title our kings have retained ever since.

DEFENSA, *defensum*, was anciently an inclosed parcel of land, set apart for the *defence* and separate feeding of deer or other cattle, as also for the security of hay or corn growing, or of springs of wood. 3 *Dudg. Mon.* 306.

So that *fence-month* in forests, is the month in which the deer fawn; during which time they are to be *defended* from disturbance.

DEFORCEMENT, is the withholding lands or tenements from the right owner; in which case, the entry of the right owner is taken away, and he is thereby driven to his action. Anciently, it was only said to be deforcement when the land was withheld by violence and force; but now it is extended generally to all kind of wrongful withholding of lands or tenements from the lawful owner. *Deforciant* is he who so withholds such lands or tenements, 1 *Inst.* 331. and in fines the cognizor or party levying or acknowledging the fine is styled the deforciant.

DEGRADATION, is an ecclesiastical censure, whereby a clergyman is deprived of his holy orders, which formerly he had, as of priest or deacon. And this, by the canon law, might

might be done two ways, either summarily, as by word only, or solemnly, by devesting the party degraded of those ornaments which were the ensigns of his order or degree; which was done in this manner: The offender was brought in having on his sacred robes, and having in his hands a book, vessel, or other instrument or ornament appertaining to his order, as if he were about to officiate in his function: then the bishop publicly took away from him, one by one, the said instruments and ornaments, saying to this effect, "This and this we take from thee, and do deprive thee of the honour of priesthood;" and, finally, in taking away the last sacerdotal vestment, saying thus, "By the authority of God Almighty, the Father, the Son, and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, degrade, despoil, and deprive thee of all order, benefit, and privilege of the clergy." *Gibf.* 1066.

There was a like ceremony in temporal matters, as in the degradation of a knight; he was stripped of his robes and ensigns of knighthood, his sword broken over his head, and his gilt spurs hacked off from his heels.

DEHORS (Fr.), without; a word used in ancient pleading, when a thing is *without* the point in question, foreign to the matter in hand, and not appearing upon the face of the record.

DELEGATES, court of, is so called, because the judges thereof are *delegated* by the king's commission under the great seal, to hear and determine appeals in the three following cases: 1. When a sentence is given in any ecclesiastical cause by the archbishop or his official. 2. When any sentence is given in any ecclesiastical cause in places exempt. 3. When a sentence is given in the admiral's court, in suits civil and marine, by the order of the civil law. This commission is usually filled with lords spiritual and temporal, judges of the courts at *Westminster*, and doctors of the civil law. 4 *Inst.* 339.

The manner of obtaining a commission of delegates is thus: The proctor of the appellant draws a petition to the lord chancellor, setting forth the cause, and what his client insisted on, and what the judge decreed; and that thereupon his client, thinking himself aggrieved, hath appealed from the said decree to the king's majesty in his high court of chancery; wherefore his client humbly requests of the
lord

lord chancellor, that a commission of appeal be made out and issued under the great seal, directed to certain judges delegate to be named at his pleasure, to hear and determine the said cause. Whereupon the lord chancellor sets down the names of such persons as he thinks proper; and afterwards a commission is drawn and executed in due form, by virtue whereof the commissioners proceed to hear and determine the matter of the appeal. 1 *Oughton*, 437.

DELIVERY, of a deed, is an essential requisite to the completion of it. For although it be signed and sealed, yet it is of no force if it is not delivered by the party himself or his special attorney, to the party to whom it is made, or to some other to his use. And it takes effect only from the delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. 2 *Black.* 306.

A delivery may be either *absolute*, that is, to the party or grantee himself; or *conditional*, to a third person, to hold till some conditions be performed on the part of the grantee; in which last case, it is not delivered as a deed, but as an *escrow*, that is, as a *scrowl*, or writing, which is not to take effect as a deed till the conditions be performed, and then it is a deed absolute. *Id.*

When a deed is delivered, words are not necessary, for then a dumb man could not deliver a deed: and as it may be delivered without words, so may it be delivered by words without any act of delivery; as if the writing lies upon the table, and the feoffor saith to the feoffee, "Take that as my deed," it is a sufficient delivery. So the deed of a corporation needs no delivery, the common seal being sufficient without it. *Wood. b. 2. c. 3.*

DEMAND, is a word of art; and in the understanding of the common law is of so large an extent, as no other word in the law is, unless it be the word *claim*. 1 *Inst.* 291.

There are two kinds of demand; a demand in *deed*, and a demand in *law*; or, an *express* and an *implied* demand. *Id.*

In a real action, he that bringeth his action maketh his *demand*, and therefore is properly called a *demandant*; and he that defendeth is called *tenant*, because he is tenant of the freehold of the land. *Id.*

If

If a man release to another all manner of demands, this is the best release to him to whom it is made, that he can have, and shall enure most to his advantage. *Litt. sect. 508.*

A release of *suits* is more large and beneficial than a release of *quarrels* or of *actions*; but a release of *demands* is more large and beneficial than either of them; for this is a release of all that the other are releases of, and more: for by a release of all *demands*, all freeholds and inheritances executory are released, as rents and the like; so also all executions, actions, entries, and seifures. So by a release of all demands to a disseisor, the right of entry to the land is released. *8 Co. 154.*

If a man leases land by indenture for years, reserving a rent payable at certain days, and the lessee covenants to pay the said rent at the days limited, the lessor is intitled to his rent, without demand; for the lessee is obliged to pay it at the days by force of his covenant. *2 Danv. Abr. 101.*

But if a lessor makes a lease rendering rent, and the lessee covenants to pay the rent, *being lawfully demanded*, the lessee is not bound to pay the rent without a demand. *Id. 102.*

But a distress for rent is a demand in itself. *1 Roll's Abr. 426. 428.*

In an action of debt upon a bill of 70*l.* to be paid upon demand, it was insisted that a demand was requisite, so that a demand in law by bringing the action will not serve the turn: but adjudged well enough; for it is a duty presently, and so needs no demand. *Cro. Eliz. 548.*

DEMANDANT, is he who claims or *demands* his right in an action respecting the *realty*, as a *plaintiff* is he who *complains* of the injury in an action respecting the *personalty*. So there is *tenant*, who *holds* the land in an action *real*, and *defendant*, who *defends* the cause in an action *personal* or *mixed*. *1 Inst. 127.*

DEMESNE, *domain*, *dominicum*, is that part of the lands of a manor, which the lord hath not granted out in tenancy, but which is reserved for his own use and occupation.

DEMISE, *dimissio*, is applied to the conveyance of an estate, either in fee, or for term of life, or years. *2 Inst. 483.*

A DEMURRER, cometh of the Latin word *demorari*, to abide; and therefore he which demurreth in law is said to be one that abideth in law, *moratur*, or *demoratur in lege*.

Whensoever.

Whensoever the counsel of the party is of opinion, that the declaration or the plea of the adverse party is insufficient in law, then he demurreth or abideth upon the point in question, and referreth the same to the judgment of the court. 1 *Inst.* 71.

But if the plea be sufficient in law, and the matter of fact be false, then the adverse party taketh issue thereupon, and that is tried by a jury; for matters in law are decided by the judges, and matters of fact by juries. *Id.*

He that demurreth in law confesses the facts to be true, as stated by the opposite party, but denies that by the law arising upon those facts any injury is done to the plaintiff, or that the defendant has made out a lawful excuse. As if the matter of the plaintiff's declaration be insufficient in law, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, the plaintiff demurs in law to the plea; and so in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case. 3 *Black.* 314.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. *Id.*

Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exceptions to the form or manner of pleading, the party demurring must set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. *Id.*

And upon either a *general*, or such a *special*, demurrer, the opposite party avers it to be sufficient, which is called a *joinder in demurrer*, and then the parties are at issue in point of law: which issue in law, or demurrer, is argued by counsel on both sides; and if the points be difficult, then it is argued openly by the judges of the court, and if they, or the greater part, concur in opinion, accordingly judgment is given: but if the court be equally divided, or conceive great doubt of the case, then may they adjourn it into the exchequer chamber, where the case shall be argued by all the judges. 1 *Inst.* 71.

And the court shall give judgment according to the very right of the cause, and matter of law, that shall appear, without regarding any want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding,

proceeding, except those only which the party demurring shall specially and particularly set down and express in his demurrer. *Id.*

And as there is a demurrer upon *pleading*, so there is a demurrer upon evidence; as if the plaintiff shew in evidence any matter of record, or deeds, or writings, or other matter of evidence by testimony of witnesses, whereupon doubt in law arises, and the defendant offer to demur in law thereupon, the plaintiff cannot refuse to join in demurrer, no more than in a demurrer upon a declaration, replication, or the like. And so, on the contrary, may the plaintiff demur in law upon the evidence of the defendant. 1 *Inst.* 72.

A demurrer in *equity* is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, on his own shewing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour: for any of these causes, a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed; if the demurrer is over-ruled, the defendant is ordered to answer. 3 *Black.* 446.

DENIZEN (Fr. *donaison*), is an alien enfranchised by the king's letters patent, and is called *donaison*, because his legitimization proceeds *ex donatione regis*. He is in a kind of middle state, between an alien and a natural born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after*, may. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands from the crown. 1 *Black.* 374.

DEODAND, is where any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

This,

This, although it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise an abhorrence of murder; and the unhappy instrument or occasion of such death is called a deodand (*Deo dandum*, to be given to God), and was anciently paid into the hands of the king's almoner, to be applied to pious uses for the soul of the deceased. Also all such weapons, whereby one man kills another, are forfeited. And therefore, in all indictments for homicide, the instrument of death, and the value, are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence), that the king or his grantee may claim the deodand; for it is no deodand, unless it be presented as such by a jury of 12 men. 3 *Inst.* 57. 1 *Haw.* 66.

It was heretofore holden, that things fixed to the freehold, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the later resolutions they cannot, unless they were severed before the accident happened. 1 *Haw.* 66.

Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand: but wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel, which runs over his body), but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited. *Id.*

After all, as this forfeiture seemeth to have been originally founded, rather in the superstition of an age of ignorance, than in the principles of sound reason and policy, it hath not of late years met with much countenance in *Westminster-hall*. And when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the quantum of the forfeiture, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so odious a claim. *Foss.* 266.

DEPARTURE, is a word in our law properly applicable to a *defendant*, who first pleading one thing in bar of an action, and being replied unto, doth in his rejoinder quit

that, and shew another matter, contrary to or not pursuing his first plea, which is called a *departure* from his plea. Also where a *plaintiff* in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a departure. This departure the law will not allow of, because it would occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading, no award made in consequence of a bond of arbitration, to which the plaintiff replies setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an intire departure from his original plea, which alleged that no such award was made; therefore he hath now no other choice, but to traverse the fact of the replication, or else to demur upon the law of it. 3 *Black.* 310.

DEPOPULATION, is a wasting or destruction; a depopulation or *unpeopling* of any place by pestilence, fire, sword, or other violence. 12 *Co.* 30.

DEPOPULATOIRES AGRORUM, were great offenders by the ancient common law; so called, because, by prostrating and ruining of houses of habitation of the king's people, they, as it were, depopulated towns and villages, leaving them without inhabitants. 3 *Inst.* 204.

DEPOSITION, is the testimony of a witness, otherwise called a *deponent*, put down in writing by way of answer to interrogatories exhibited for that purpose.

Depositions of witnesses may be read when the witness is dead, but not when the witness is living; for whilst the witness is living, they are not the best evidence the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *Id.*

So if it is proved that a witness was subpoenaed, and fell sick by the way; for in this case likewise, the deposition is the best evidence that can be had; and that answers what the law requires. *Id.*

But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because

because he had not liberty to cross-examine the witnesses; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. For this reason, depositions in chancery shall not be read for or against the defendant upon an information or indictment, for the king was no way party to the suit. *Id.*

Yet this rule admits of some exceptions; as, particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more credit than what another person swears he heard him say. So a deposition taken in a cause between other parties will be admitted to be read, to contradict what the same witness swears at a trial. *Id.* 30, 31.

It is a general rule, that depositions taken in a court not of record, shall not be allowed in evidence elsewhere. So it hath been holden with regard to depositions in the ecclesiastical court, though the witnesses were dead. So where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence. *Id.* 33, 34.

But the examination of an informer taken upon oath, and subscribed by him, either before a coroner upon an inquisition of death, or before justices of the peace in pursuance of the statutes of *Ph. & M.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the satisfaction of the court, that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn to before the coroner or justice, without any alteration whatsoever. 2 *Haw.* 429.

Where witnesses in a cause are going to sea, or on a long journey, the court will give leave to examine them on interrogatories, at a judge's chamber, in the presence of the attorneys on both sides; which depositions in such case will be admitted as evidence. *Pract. Att.* 234.

DEPRIVATION, is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity.

In all causes of deprivation, these things must concur:

1. A monition or citation of the party to appear.
2. A charge given him, to which he is to answer, called a libel.
3. A competent time assigned for the proofs and answers.

4. A liberty for counsel to defend his cause, and to except against the proofs and witnesses. 5. A solemn sentence, after hearing all the proofs and answers. If these be not observed, the party hath cause of appeal, and may have remedy by a superior court. 1 *Still.* 323.

But besides deprivation by canonical censures, there are divers penal statutes which for some crime or neglect declare the benefice to be void, without a formal sentence of deprivation; as, for simony, for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer; for neglecting, after institution, to read the liturgy and articles in the church, or to make the declarations against popery, or to take the oath of abjuration; in all which, and other like cases, the benefice is *ipso facto* void, without any formal declaratory sentence. 1 *Black.* 393.

DEPUTY, is one that exerciseth an office in another man's right, whose forfeiture or misdemeanor shall cause him, whose deputy he is, to lose his office. The common law takes notice of deputies in many cases, but not of under deputies; for a deputy is generally but a person authorised who cannot authorise another. 1 *Lill. Abr.* 446.

There is a difference between a *deputy* and an *assignee* of an office. For an assignee hath an estate or interest in the office itself; and doth all things in his own name; for whom the grantor of the office shall not answer, except in special cases. And when an officer hath power to make an assignee, he may of course make a deputy. Also when an office descendeth to an infant, idiot, or the like, he may of course make a deputy. But the superior officers must answer for their deputies in civil actions, if they are not sufficient to answer damages: in criminal cases, deputies must answer for themselves. *Wood. b. 2. c. 2.*

A *sheriff* may make a deputy, except in some particular things which are to be done by the sheriff himself; as if a writ saith, that the sheriff shall go *in person*. The sheriff, and not the king, hath power to appoint this deputy, although there is no particular power given in his patent to make a deputy; for it is an incident to the sheriff's office, and it would be inconvenient, if the sheriff should be responsible for his deputy that is chosen by another. 9 *Co.* 49.

A *coroner* cannot make a deputy, for he is a judicial officer, and therefore ought to execute his office in person. *Wood. b. 1. c. 7.*

But

But a *constable*, inasmuch as his office is wholly ministerial, and not judicial, may make a deputy. *Bur. Mansf.* 1259.

DERAIGN (Fr.), *disfranchiare*; to confound and disorder, or to turn out of course, or displace.

DERELICT, is any thing forsaken or left. Derelict lands, left by the sea, belong to the king; but if the sea shrinks back by degrees below the usual water mark, the land gained shall go to the owner of the land adjoining. 2 *Black.* 262.

DESCENDER. Writ of *formedon in descender* lies where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them, and dies; the heir in tail, in order to recover the same, shall have this writ against him who is then the actual tenant of the freehold. 3 *Black.* 192.

DESCENT, or hereditary succession, is the title by which a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. And an estate so descending to the heir, is in law called the inheritance. 2 *Black.* 201.

Descent is of three kinds; by *common law*, by *custom*, or by *statute*. By *common law*, as where one hath land of inheritance in fee simple, and dieth without disposing thereof in his life-time, and the land goes to the eldest son and heir of course, being cast upon him by the law. Descent of fee simple by *custom*, is sometimes to all the sons, or to all the brothers (where one brother dieth without issue), as in gavel-kind; sometimes to the youngest son, as in Borough English; and sometimes to the eldest daughter, or the youngest, according to the customs of particular places. Descent by *statute* is of fee tail, as directed by the statute of *Westm. 2. de donis*.

Descent at common law is either *lineal* or *collateral*: *lineal* is a descent downwards in a right line, from the grandfather to the father, the father to the son, the son to the grandson: *collateral* is a descent which springs out from the *side* of the whole, as another branch thereof; such as a grandfather's brother, the father's brother, and so downward.

Inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*; but shall never lineally ascend. 3 *Black.* 208.

The male issue shall be admitted before the female; and where there are two or more males in equal degree, the eldest only shall inherit (except where there are particular local customs to the contrary): but the females shall inherit all together, except in case of succession to the crown, which is indivisible; and of succession to dignities and titles of honour: yet where a man holds an earldom to him and the heirs of his body, and dies, his eldest daughter shall not succeed of course to the title of countess, but the dignity is in suspension or abeyance till the king shall declare which of the daughters shall have that title. 2 *Black.* 216.

If lands come by descent from the mother, the heir on the part of the father shall never inherit; nor, if the lands come by descent from the father, shall the heirs on the part of the mother inherit: but if it be not known from what side the inheritance descended, or where the person from whom the land is claimed by descent was himself the first purchaser; there the heir on the part of the father, however distant, shall be admitted; and if no heir on the part of the father can be found, then the heir on the part of the mother shall be admitted. 2 *Black.* 222.

But if a man seised of land as heir on the part of his mother, makes a feoffment, and takes back an estate to him and his heirs; this, as a purchase, alters the descent, and if he die without issue, the heir on the part of the father shall inherit it. 1 *Inst.* 12.

If a man die without issue, the inheritance shall descend to his next collateral kinsman of the *whole blood*, either personally or by representation; but the *half blood* can never inherit. 2 *Black.* 227. But in descent of estates tail, half blood is no hindrance, because the issue are in *per formam doni*.

If one die seised of lands, in which another hath a right to enter, and it descends to his heir, such descent shall take away the other's right of entry, and put him to his action for recovery thereof.

DESCRIPTION, *descriptio*. In deeds and grants there must be a *certain* description of the lands granted, the *places* where the lands lie, and of the *persons* to whom granted, &c. to make them good. But wills are more favoured than grants as to those descriptions; a wrong description of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nelf. Abr.* 647.

DETINUE,

DETINUE, is a writ which lieth where any man comes to goods either by delivery, or by finding. It is called *a detinendo*, because *detinet* is the principal word in the writ; and it lies only for the *detaining*, when the taking was lawful. 1 *Inst.* 286.

So if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by this action of detinue. 3 *Black.* 151.

In this writ, the plaintiff shall recover the thing detained; and therefore it must be so certain, as that it may be specifically known. Therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. *Id.*

In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully by the goods, as either by delivery to him, or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value. And, 4. That they be ascertained in point of identity. Upon this, the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional, that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. *Id.*

But there is one disadvantage which attends this action; namely, that the defendant is herein permitted to wage his law; that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy. For which reason this action is of late much disused, and hath given place to the action of trover. *Id.*

A man may have an action of *detinue of charters* which concern the inheritance of his land, if he know the certainty of them, and what land they concern; or if they be in a bag sealed, or chest locked, though he knows not the certainty of them; and it is good policy (if possibly he can) in that case to declare of one charter in special, and then the defendant shall not wage his law. 1 *Inst.* 286.

DEVASTAVIT, is a writ that lies against executors or administrators, for paying debts upon simple contract before debts on bonds and specialties, or the like; for in this case

they are as liable to action as if they had squandered away the goods of the deceased, or converted them to their own use; and are compellable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. *Dyer*, 232.

But if an executor pays debts upon simple contract, before he hath any notice of bonds, it is not a *devastavit*; otherwise it might be in the power of the obligee to ruin the executor, by keeping up his bond, until the executor shall have paid away all the assets in discharging simple contract debts. But of debts upon record, the executor ought to take notice at his peril. 2 *Bac. Abr.* 434.

Where an executor pays legacies before debts, and hath not sufficient to pay both, it is a *devastavit*. Also where an executor sells the testator's goods at an under value, it is a *devastavit*; but this is to be understood where the sale is fraudulent, for if more money could not be had, it is not a *devastavit*. *Kelw.* 59. 1 *Nelf. Abr.* 649.

DEVISE, is the disposition of lands and tenements by will; as *testament* is the disposition in like manner of goods and chattels: but the words are often used promiscuously the one for the other. See WILL.

DICE. By several statutes, duties are imposed upon every pair of dice made in *Great Britain*, which are to be under the management of the commissioners of the stamp duties.

DIEM CLAUSIT EXTREMUM, is a writ so called from those special words in the writ, issued to the escheator of the county, upon the death of any of the king's tenants *in capite*, to take the lands into the king's hands, and to inquire by a jury how much land such tenant held of the king *in capite*, what was the yearly value thereof, who was his heir, and of what age. And the heir, if of age, or when he came of age, was to have the lands delivered back to him, which was called *livery* of the lands; the tenant having first paid to the king his relief or fine for the same.

DIES DATUS, is a day or time of respite given by the court to the defendant in a suit.

DIEU ET MON DROIT, *God and my right*; the motto of the royal arms; intimating, that the king of *England* holds

holds his empire of none but *God*. It was first assumed by king *Richard* the first.

DIGNITY, signifies honour and authority. It may be divided into superior and inferior; as the titles of duke, earl, baron, are of the higher sort of dignities; so baronet, knight, esquire, are of the lower order. And there are ecclesiastical dignities, as those of bishop, dean, archdeacon, prebendary; and the possessor of those dignities is called *dignitary*.

DILAPIDATION, is a kind of ecclesiastical waste, either voluntary, by pulling down, or permissive, by suffering the chancel, parsonage-house, and other buildings, or fences, to decay for want of necessary reparation. In which case an action lies either in the spiritual court by the canon law, or in the courts of common law: and may be brought by the successor against the predecessor, if living, or, if dead, against his executors. It is also said to be good cause of deprivation, if a bishop, parson, vicar, or other ecclesiastical person, dilapidates the buildings, or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the courts of common law. By the statute 13 *Eliz. c. 10.* if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor. And by 14 *Eliz. c. 11.* all money recovered for dilapidations shall, within two years, be employed upon the buildings, in respect whereof it was recovered, on pain of forfeiting double value to the crown. 3 *Black. 91.*

DILATORY pleas are of three kinds: 1. To the *jurisdiction* of the court, alleging, that it ought not to hold plea of the matter in hand, as belonging to some other court. 2. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit, as that he is outlawed, attainted, an infant, or the like. 3. In *abatement*, as for some defect in the writ, as a misnomer of the defendant, or other want of form in any material respect. These pleas were formerly used as merely dilatory, without any foundation of truth, and calculated only for delay; but now by the statute 4 & 5 *An. c. 16.* no dilatory plea shall be admitted, without affidavit made of the truth thereof, or some probable

probable matter shewn to the court, to induce them to believe it true. 3 *Black.* 301.

DIMISSORY LETTERS, are such as are used where a candidate for holy orders hath a title in one diocese, and is to be ordained in another; the proper diocesan sends his letters dimissory directed to some other ordaining bishop, giving leave that the bearer may be ordained, and have such a cure within his district.

DIOCESE (from the Greek *διοικω*, *seorsim habito*), signifies the circuit of a bishop's jurisdiction. For this realm hath two sorts of divisions, one into shires or counties in respect of the temporal state, and another into provinces in regard to the ecclesiastical state. Which provinces are subdivided into dioceses. The provinces are two; those of *Canterbury* and *York*, whereof *Canterbury* includes twenty-one dioceses or sees of suffragan bishops; and *York* three, besides the bishoprick of the *Isle of Man*, which was annexed to the province of *York* by king *Henry* the eighth. 1 *Inst.* 94.

DISABILITY is, where a man is disabled, or made incapable to inherit any lands, or take that benefit which otherwise he might have done. Which may happen four ways; by the act of an ancestor; or of the party himself; by the act of *God*; or of the law. 1. Disability by the act of the *ancestor*; this is, where the ancestor is attainted of treason or felony, which corrupts the blood of his children, so that they may not inherit his estate. 2. Disability by the act of the *party*; which is, where a man binds himself by obligation, that upon surrender of a lease, he will grant a new estate to the lessee, and afterwards he grants over the reversion to another, which puts it out of his power to perform it. 3. Disability by the act of *God*: where a person is of *non-sane* memory, whereby he is incapable to make any grant; so that if he passeth any estate out of him, it may after his death be made void; but it is a maxim in law, that a man of full age shall not be received to disable his own person. 4. Disability by act of the *law*; this is where a man by the sole act of the law, without any thing by him done, is rendered incapable of the benefit of the law; as an alien born, or the like. *Terms of the Law.*

There are also other disabilities by statute in many cases; as papists are disabled to present to church benefices; of-

ficers not taking the oaths are disabled to hold their offices; foreigners, though naturalized, to bear offices in the government; and many other such like.

DISCLAIMER is, where a tenant, who holds of the lord of the fee, neglects to render him the due services, and, upon an action brought to recover them, *disclaims* to hold of his lord; which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord. And so likewise if, in any court of record, the tenant doth any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like; such behaviour amounts to a forfeiture of his estate. 2 *Black.* 275.

DISCONTINUANCE, *of an action*, is where the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from time to time; in which case he must begin again, and usually pays costs to the defendant. 3 *Black.* 296.

Discontinuance of an estate is, when he who hath an estate tail, makes a larger estate of the land than by law he is intitled to do: in which case the estate is good, so far as his power extends, but no farther: as if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail, all which are beyond his power to make; for that, by the common law, extends no farther than to make a lease for his own life; here the entry of the feoffee is lawful during the life of the feoffor: but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance of the estate, by which he who hath right is driven to his action. 3 *Black.* 171.

DISCRETION, *discretio*, when a thing is left to any person to be done according to his *discretion*, the law intends it must be done with sound *discretion*, and according to law: and the court of king's bench hath a power to redress things that are otherwise done, notwithstanding they are left to the *discretion* of those that do them. 1 *Lill. Abr.* 477.

DISFRAN-

DISFRANCHISEMENT, is the taking away a man's freedom or privilege. Corporations generally have power by their charter or prescription to disfranchise a member for doing any thing against the duty of his office as citizen or burghers, and to the prejudice of the weal public of the city or borough, and against his oath which he took when he was sworn a freeman of the city or borough. But words of contempt, or against good manners, although they may be caused to bind him to the good behaviour, yet they are not a sufficient cause to disfranchise him. So if he intend or endeavour of himself, or conspire with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the corporation, but doth not execute that thing, it may be cause to punish him for the same, but not to disfranchise him. For when a man is a freeman of a city or borough, he hath a freehold for life in his freedom, and with others in their politic capacity hath inheritance in the lands of the corporation, and interest in their goods, and perhaps it concerns his trade and means of living; and therefore the matter which shall be cause of his disfranchisement ought to be an act or deed, and not an endeavour or enterprize whereof he may repent before the execution thereof, and whereof no prejudice doth ensue. 11 Co. 98.

DISMES, *decima*. See **TITHES**.

DISPENSATION. Notwithstanding the statute of provisors, and divers other statutes against the papal incroachments upon the ecclesiastical jurisdiction in this realm, the pope's power still prevailed against all these statutes; and particularly in the matter of dispensations, which was one great branch of the revenue of the apostolic see. But by the statute of 25 H. 8. c. 21. this power was taken from the pope, and vested in the archbishop of *Canterbury*, so far forth as such dispensations may be lawfully granted without offending the laws of *God*, and that in all greater matters the king's consent in chancery be obtained.

DISPENSING POWER OF THE CROWN, by a *non-obstante* to an act of parliament, was carried so far in the reign of king *James* the second, as to render the execution of the laws intirely dependant on the pleasure of the king; therefore by the 1 W. sess. 2. c. 2. it is declared and enacted,

acted, that the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

DISSEISIN, is a wrongful putting out of him that is seised of the freehold. Which may be effected either in *corporeal* inheritances, or *incorporeal*. Disseisin of things *corporeal*, as of houses and lands, must be by entry and actual dispossession of the freehold; as if a man enters either by force or fraud into the house of another, and turns, or at least keeps him and his servants out of possession. Disseisin of *incorporeal* hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. But the disseisin of *incorporeal* hereditaments is only at the election and choice of the party injured, if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. And so also even in *corporeal* hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of intitling himself to the more easy and commodious remedy of an assize of *novel disseisin*, instead of being driven to the more tedious process of a writ of *entry*. 3 Black. 169.

DISSENTERS. By the 1 W. 3. c. 18. commonly called the act of toleration, it is enacted, that none of the acts made against persons dissenting from the church of England (except the test acts 25 C. 2. c. 2. and 30 C. 2. 3. c. 1.) shall extend to any dissenters, other than papists, and such as deny the Trinity: provided, 1. That they take the oaths of allegiance and supremacy (or, being quakers, make an affirmation to the like purpose), and subscribe the declaration against popery. 2. That they repair to some congregation certified to and registered in the court of the bishop or of the quarter sessions. 3. That the doors of such meeting-house shall not be locked, barred, or bolted. Dissenting teachers also, by the 19 G. 3. c. 44. shall subscribe a declaration that they are christians and protestants, and as such, believe the scriptures of the old and new testament. And if any person shall wilfully disturb any congregation assembled in any dissenting meeting-house, or misuse any teacher

or preacher there, he shall be bound over to the sessions of the peace, and on conviction there shall forfeit 20 *l*.

By the 1 *G. 2. c. 5.* if any persons, riotously and tumultuously assembled, shall demolish or pull down, or begin to demolish or pull down, any building for religious worship, duly registered and certified according to the said act 1 *W.* they shall be adjudged guilty of felony without benefit of clergy.

If a dissenter be chosen constable, churchwarden, overseer of the poor, or to any parochial or ward office, he may execute the same by a sufficient deputy; and dissenting teachers and preachers shall be exempted from the said offices, and also from serving upon juries. 1 *W. 1. c. 18.* (And from serving in the militia. 19 *G. 3. c. 44.*)

DISTRESS, is the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for the wrong committed; and is of two kinds, either for cattle trespassing and doing damage, or for non-payment of rent or other duties.

Distress for rent must be for rent in arrear; therefore it may not be made on the same day on which the rent becomes due, as on the last day of the term of the lease. And therefore some use to reserve the last half year's rent at some time before the lease expires, so as if the rent be not then paid, he may distrain before the lease expires.

1 *Inst. 47.*

Generally, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: otherwise a door would be open to infinite frauds.

3 *Black. 8*

Distress for rent must be of a thing whereof a valuable property is in somebody; and therefore those things which are *feræ naturæ* cannot be distrained. 1 *Inst. 47.*

Whatever is in the personal use or occupation of a man, is for the time privileged from distress; as an ax with which a man is cutting wood, or a horse whilst a man is riding upon him. *Id.*

So things for maintenance of trades; as a horse in a smith's shop, materials in a weaver's shop for making of cloth, sacks of corn in a mill, and such like. *Id.*

On

On a verbal lease, where the *quantum* of the rent appears, the landlord may distrain; but if there is no proof of the *quantum*, the landlord can only recover a *quantum meruit* by action on the case.

Distress must be in the day time; except for damage-feasant, which may be in the night; otherwise the goods may be gone before he can take them. 1 *Inst.* 142.

Generally, distress must be made on the premises: but if the goods be fraudulently carried off, they may within thirty days be distrained at any other place. 11 *G. 2. c.* 19.

Doors, gates, or inclosures, may not be broken open for making distress, unless where the goods are clandestinely removed; in which case, upon a warrant from a justice of the peace, they may be broken open. *Id.*

Distress may be impounded on any part of the premises. *Id.*

And no distress shall be driven out of the hundred, unless to an open pound in the same shire, and within three miles of the place where the distress was taken. 1 & 2 *P. & M. c.* 12. Note, a pound is said to be either *overt*, or open; as in a pinfold made for such purposes, or in a man's own close, or in the close of another by his consent; and it is therefore called open, because the owner may give his cattle meat and drink, without trespass to any other; and then the cattle must be sustained at the peril of the owner: or it is a pound *covert*, or close; as to impound the cattle in some part of his house; and then the cattle must be sustained at the peril of him that distraineth, and he shall not have any satisfaction for the same. But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house or other pound covert; for if he impound them in a pound overt, he must answer for them. 1 *Inst.* 47.

Cattle distrained may not be worked or used, much less abused or hurt. *Cro. Ja.* 148.

If a man break the pound, he is by the common law indictable for the same, as an offence against the peace: or by the statute 2 *W. c.* 5. the distrainer may, upon an action on the case, recover treble damages and costs.

In case of distress for rent, if the tenant do not, within five days after the distress taken, and notice of the cause thereof given to him, replevy the goods, the distrainer, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards

satisf.

satisfaction of the debt and charges, rendering the overplus, if any, to the owner.

In case of distress by warrant of a justice of the peace for a penalty or forfeiture, the justice shall order the distress to be sold within a certain time limited in the warrant, so as such time be not less than four days, nor more than eight. 27 G. 2. c. 20.

DISTRESS INFINITE, is a process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge, to enforce the performance of something due from the party distrained upon. Generally, it is provided that distresses shall be reasonable and moderate; but in case of distress for suit of court, or for defect of appearance, in several cases, where this is the only method of enforcing compliance, no distress can be immoderate; because, be it of what value it will, it cannot be sold, but shall be immediately restored on satisfaction made. 3 Black. 231.

DISTRIBUTION of intestate's effects, after payment of the debts of the deceased, is to be made according to the statute of 22 & 23 C. 2. c. 10. in manner following: One third shall go to the widow of the intestate, and the residue in equal proportions to his children; or, if dead, to their representatives; that is, their lineal descendants: if there are no children, or legal representatives, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, or their representatives: if no widow, the whole shall go to the children: if neither widow nor child, the whole shall be distributed amongst the next of kindred in equal degree, and their representatives: but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The father succeeds to the whole personal effects of his children, if they die intestate and without issue; but if the father be dead, and the mother survives, she shall only come in for a share equally with each of the remaining children.

There are some local customs excepted out of the act, in which the proportions of the distribution vary in different places.

DISTRINGAS, is a writ directed to the sheriff, commanding him to *distrain* one by his goods and chattels, to enforce his

his compliance with what is required of him, as for his appearance in court on such a day. *F. N. B.*

DISTURBANCE, is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. Of this there are divers kinds: As, 1. Disturbance of *franchises*; which is, when a man has the franchise of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or the like, and he is disturbed or incommoded in the lawful exercise thereof. 2. Disturbance of *common*; as where one who has no right of common puts his cattle into the land; or who, having a right of common, surcharges the common, by putting in more cattle than he hath a right to do, or puts in any cattle that are not commonable. 3. Disturbance of *ways*; as where a man, who hath right to a way over another man's ground, is obstructed by inclosures or other obstacles. 4. Disturbance of *patronage*; which is an hindrance or obstruction of a patron to present his clerk to a benefice. 3 *Black.* 236.

DIVORCE, is a separation of a man and a woman who have been *de facto* married together: and it is of two kinds; the one, that dissolveth the marriage, *a vinculo matrimonii*; and the other, *a mensâ et thoro*, which dissolveth not the marriage, for that the offence is after a just and lawful marriage. 3 *Inst.* 88.

Causes for separation *a vinculo*, are consanguinity or affinity within the degrees prohibited, also impuberty or frigidity; where the marriage itself was merely void *ab initio*, and the sentence of divorce only declaratory of its being so. And the effects of this original voidance and nullity are, that the wife is barred of dower, and the issue are illegitimate, and that the persons so divorced may marry any others. *Gibf.* 446.

But if either of the parties be dead before sentence given, the spiritual court cannot proceed to declare the marriage void, and bastardize the issue. *Id.*

Divorce *a mensâ et thoro* is, when the use of matrimony, as the cohabitation of the married persons, or their mutual conversation, is prohibited for a time, or without limitation of time; in which the marriage, having been originally good, is not dissolved, nor affected as to the *vinculum* or

bond. Nor doth this bar the wife of dower, nor bastardize the issue; but intitles her to alimony, which the ecclesiastical court assigns, in proportion to the circumstances and condition of the husband. *Id.* 335.

DOCKET or DOGGET. By statute 4 & 5 *W. c.* 20. the proper officers respectively in the courts at *Westminster* shall enter and put into an alphabetical dogget by the defendants names, a particular of all judgments for debt entered in the respective courts. And no judgment not doggetted and entered as aforesaid shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators.

DOCTORS COMMONS, is the college of civilians in *London*, which was purchased by Dr. *Harvey*, dean of the arches, for the professors of the civil law. Here commonly reside the dean of the arches, the judge of the admiralty, the judge of the prerogative court of *Canterbury*, with divers other eminent civilians; who there living (for diet and lodging) in a collegiate manner, and commoning together, it is known by the name of *doctors commons*. It was burned down in the fire of *London*, and rebuilt at the charge of the profession. *Chamb. present State.*

DOG, not being an animal fit for food, the law doth not set such an intrinsic value on it, as to make the stealing thereof to be felony; but the owner may maintain an action for the loss of it. And by statute 10 *G. 3. c.* 18. if any person shall steal any dog, or keep any dog knowing the same to be stolen, or shall knowingly have in his house the skin of any dog stolen, he shall forfeit for the first offence not exceeding 30*l.* nor less than 20*l.* for the second offence not exceeding 50*l.* nor less than 30*l.*

A mastiff going at large in the street unmuzzled, from the ferocity of his nature. being dangerous and cause of terror to his majesty's subjects, seems to be a common nuisance, and consequently the owner may be indicted for suffering him to go at large.

If a man hath a dog that kills sheep, this is not a public nuisance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be punished for this killing: and in an action upon
the

the case for such killing, the plaintiff shall be required to prove in evidence that the dog had used to kill sheep. *Dyer*, 25. *Het.* 171.

And in order to maintain an action for *biting* by the defendant's dog, it must be proved also that he knew his dog to have this property; but one instance is sufficient in that case. 12 *Mod.* 555.

DOIT, *doitkin*, was a base coin of small value, prohibited by the statute 3 *H. 5. c. 1.* We still retain the word in common speech, when (in order to undervalue a man) we say that he is not worth a *doit*.

DOM-BEC (Sax. *doom-book*, liber judicialis), was a book wherein *Alfred* the Great, after his uniting of the Saxon heptarchy, collected the various customs that he found dispersed throughout the kingdom, and reduced and digested them into one uniform system and code of laws. 4 *Black.* 411.

DOMESDAY (*liber judicialis vel censualis Angliæ*), is an ancient record made in the time of *William* the Conqueror, which is still fair and legible; consisting of two volumes, a greater and a less: the greater containing a survey of all the lands in *England*, except the counties of *Northumberland*, *Cumberland*, *Westmorland*, *Durham*, and part of *Lancaster*, which, it is said, were never surveyed; and, excepting *Essex*, *Suffolk*, and *Norfolk*, which three last are comprehended in the lesser volume. There is also a third book, which differs from the others in form more than matter, made by the command of the same king. And there is a fourth book kept in the exchequer, which is called *domesday*; and though a very large volume, is only an abridgment of the others. Likewise, a fifth book is kept in the remembrancer's office in the exchequer, which has the name of *domesday*, and is the same with the fourth before mentioned.

Our ancestors had many *domesday* books. King *Alfred* had a roll which he called *domesday*, which referred to the time of king *Ethelred*; as that made by *William* the Conqueror did refer to the time of *Edward* the Confessor.

It is generally known, that the question whether lands are ancient demesne or not is to be decided by the *domesday* book of *William* the Conqueror; from whence there is no appeal. And it is a book of that authority, that even the

Conqueror himself submitted some cases wherein he was concerned to be determined by it.

The addition of *day* to this *doom* book was not made with any allusion to the final day of judgment, as many persons have conceited; but was to strengthen and confirm it, and signifies the judicial decisive record or book of dooming judgment and justice. *Hammond's Annot.*

The dean and chapter of *York* have a register styled *domesday*; so has the bishop of *Worcester*; and there is an ancient roll in *Chester* castle called *domesday* roll. *Blount.*

DONATIO CAUSA MORTIS, or a gift in prospect of death, is, when a person in his last sickness delivers, or causes to be delivered, to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to be his in case the giver die; but if he lives, he is to have it again. But this is not good against creditors.

DONATIVE, is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction, by any mandate from the bishop or other; but the donee may, by the patron, or by any other authorised by the patron, be put into possession. *Degge, Part 1. c. 13.*

If the patron of a donative do not nominate a clerk, there can be no lapse thereof; but the bishop may compel him to do it by spiritual censures. *1 Inst. 344.*

But if it hath been augmented by the governors of queen *Anne's* bounty, it will lapse in like manner as presentative livings.

A donative is free from the visitation of the ordinary; but the patron must visit the same by commissioners to be appointed by him. *1 Inst. 344.*

But although the ordinary hath not power as to the place, so as to regulate seats in that church, or the like; yet he hath power as to the parson, if he commits any misdemeanor, to proceed against him by spiritual censures. *L. Raym. 1205.*

So in the case of churchwardens, if they refuse to take upon them the office, or the like; the ordinary may compel them: for although there is a difference as to the incumbent, yet as to the parish officers there is none; for they are the

officers of the parish, and not of the patron of the donative.
Str. 715.

DOUBLE PLEA, is where the defendant allegeth for himself two several matters in bar of the plaintiff's action, when one of them is sufficient, which shall not be admitted; as if a man plead several things, the one not depending on the other, the plea is accounted double: but if they mutually depend on each other, and the party may not have the last plea without the first, then it shall be received. *Kitch.* 223. Also by statute 4 & 5 *Ann. c.* 16. a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, he may plead these three, not guilty, son assault demesne, and the statute of limitations. 3 *Black.* 308.

DOUBLE QUARREL (*duplex querela*, double *querelle* or complaint, called improperly *double quarrel*), is a complaint made by any clerk or other to the archbishop against any inferior ordinary, for delaying justice in any cause ecclesiastical, as to give sentence, to institute a clerk presented, or the like. The effect of which is, that the archbishop, taking knowledge of such delay, directs his letters under his authentic seal, to all and singular clerks of his province, thereby commanding them to admonish the said ordinary within a certain time to do the justice required; or otherwise to cite him to appear before the said archbishop or his official at a day in the said letters prefixed, and there to allege the cause of his delay; and, lastly, to intimate to the said ordinary, that if he performs not the thing enjoined, nor appears at the day assigned, he will proceed to do justice in the premises. And it seems to be called a *double querelle*, because it is most commonly made both against the judge, and against the party at whose request justice is delayed by the said judge. *Clarke's Prax.* tit. 84, 5, 6.

DOWER :

TENANT in DOWER, is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture; to hold to the same wife in severalty by metes and bounds. *Litt. sect.* 36.

Seised. This word *seised* extendeth as well to a seisin *in law*, as to a seisin *in deed*; as where lands descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, although it be not reduced to an actual possession; for it lieth not in the power of the wife to bring it to be an actual seisin, as the husband may do of his wife's land, when he is to be tenant by curtesy. 1 *Inst.* 31.

And yet of every seisin in law, or actual seisin, of lands or tenements, a woman may not be endowed. For example, if there be grandfather, father, and son; and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, whereupon the wife becomes endowed of one of those acres; the inheritance descends to the father, who dieth either before or after entry, in this case the wife of the father shall be endowed only of the two acres residue; for the dower of the grandmother is paramount the title of the wife of the father; and the seisin of the father which descended to him (be it in law or in deed), is defeated; and upon the matter the father had but a reversion expectant upon a freehold, and in that case dower ought not to be demanded of dower, although the wife of the grandfather dieth, living the father's wife. 1 *Inst.* 31.

Of certain lands or tenements. Copyhold lands are not liable to dower, being only estates at the will of the lord; unless by especial custom of the manor: in which case it is usually called the widow's free bench. 2 *Black.* 132.

It is now settled, that of a *trust* estate a wife is not dowerable. 2 *Atk.* 526.

Of lands which the husband holdeth *jointly* with another, the wife shall not be endowed; but where he holdeth in common, it is otherwise. *Litt. sect.* 45.

In the case of *Broughton and Randal*, T. 38 *Eliz.* the father and son were joint-tenants, to hold to them and the heirs of the son: they were both hanged out of the same cart at the same time; but because the son (as was deposed by witnesses) survived, as appeared by some tokens; namely, his shaking his legs; his widow thereupon demanded dower, and it was adjudged to her. *Cro. Eliz.* 503.

Of *common certain*, a wife shall be endowed; but of a common *without number* in gross, she shall not be endowed; for as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly charged. 1 *Inst.* 32.

The wife after the decease of her husband shall be endowed. By the statute of *magna charta*, c. 7. the widow shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarantine.

But where the certainty appeareth what lands or tenements the wife shall have for her dower, as was heretofore the case of dower *ad osium ecclesie*, which was assigned to the woman at the church door at the time of her marriage; there the wife may enter after the death of her husband, without assignment of any. But where the certainty appears not, as to be endowed of the third part to have in severalty, or the moiety according to custom to hold in severalty; in such cases, the particular lands to be held in dower must be assigned by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to intitle the lord of the fee to demand his services of the heir, in respect of the lands so held. If the heir, or his guardian, do not assign her dower within the term of quarantine, or do assign it unfairly, she hath her remedy at law, and the sheriff is appointed to assign it. 2 *Black.* 136.

This great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same; wherein sometimes great delays are used: and therefore the well advised friends of the wife will provide for a jointure to be made to her. 1 *Inst.* 32.

Upon which account, on preconcerted marriages, and in estates of considerable consequence, tenancy in dower now very seldom happens; for the claim of the wife to her dower at the common law, diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the disuse of dower *ad osium ecclesie*, jointures have commonly been introduced in their stead, as a bar to the claim at common law. 2 *Black.* 136.

Of such lands or tenements as were her husband's at any time during the coverture. Unto dower three things do belong; viz. marriage, seisin, and the death of the husband. Concerning the seisin, it is not necessary that the same should continue during the coverture; for although the husband alieneth the lands, yet his widow shall be endowed. But

it is necessary that the marriage do continue, for if it be dissolved, the dower ceaseth: but this is to be understood where the husband and wife are divorced *a vinculo matrimonii*, as for consanguinity or affinity; and not *a mensâ et thoro*, as for adultery. 1 *Inst.* 32.

If the wife elope from her husband, and goeth away, and tarrieth with her adulterer, she shall lose her dower, unless the husband be reconciled to her, and permit her to cohabit with him. *Ibid.*

The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not intitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband: but if the land abides in him for a single moment, it seems that the wife shall be endowed thereof.

2 *Black.* 131.

As to *exchanges*, the wife shall not be endowed both of the land given in exchange, and of the land taken in exchange, although the husband was seised of both; but she may have her election to be endowed of which she will. 1 *Inst.* 31.

To hold to the wife in severalty by metes and bounds. But of inheritances that are intire, and of which no division can be made, she shall be endowed in a special manner. As of a mill, she shall not be endowed by metes and bounds, nor in common with the heir; but she may be endowed of the third toll dish, or of the mill, every third month. So she shall be endowed of the third part of the profit of stallage, of the third part of the profits of a fair, of an office, of a dove cote, of a fishery, that is, every third fish, or every third cast of the net; so of the third presentation to an advowson; of the third part of the profits of courts, fines, heriots, and other services; so also of tithes; and the surest endowment of tithes is of the third sheaf; for what land shall be sown is uncertain. 1 *Inst.* 32.

And to her estate in dower there are the like incidents as to other life estates. She shall have estovers of housebote, ploughbote, and haybote; but shall not be allowed to commit waste. If she sows the land, and dies before harvest, her executor shall have the crop. But if she determine the estate by her own act, as by marrying again, she shall not be

be intitled to receive the crop. But if she leases the estate to an under-tenant, who sows the land, and she marries before the corn is cut, this shall not deprive the under-tenant of the crop, because it was not in his power to prevent her marrying. 2 *Black.* 123.

DRAWLATCHES, thieves, drawing the *latch* of the door; that is, entering privately to rob the house.

DRENGAGE, was a servile tenure, and not freehold (as supposed by Sir *H. Spelman*); for in *Westmorland*, in the reign of king *Hen. 2.* Sir *Hugh Morvil* changed the service from *drengage* to *free service*; which implies that it was not free before. In some parts of the said county, the tenants gave one half of their lands, to have the other half made free from that service. It seems to have been pure villenage. *Drenges* were the tenants who held by that service.

DROIT, right, is the highest writ of all other real writs whatsoever, and has the greatest respect, and the most assured and final judgment; and therefore, is called a writ of right; and in the old books *droit*. 1 *Inst.* 158. *Droit, droit*, are words that signify a double right; both of property, and of possession. *Id.* 266.

DRUNKENNESS. By several statutes in the reign of king *James* the first, every person convicted of drunkenness shall forfeit 5*s.* and for want of distress, shall be committed to the stocks for six hours: if he shall be again convicted of the like offence, he shall be bound in a recognizance of 10*l.* with condition, to be from thenceforth of good behaviour. And an alehouse-keeper, convicted of drunkenness, shall, besides the other penalties, be disabled to keep any such alehouse for three years.

Drunkenness excuseth no crime; but he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober; for the law, considering how easy it is to counterfeit his excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another. 1 *Haw.* 2. 4 *Black.* 26.

DUCES TECUM, is a writ out of chancery, commanding a person to appear at a certain day in court, and to *bring with him* some writings, evidences, or other things, to be inspected and examined in court. *Regist.*

DUCKING STOOL. See **CUCKING STOOL.**

DUELLING, or single combat, between any of the king's subjects, of their own heads, and for private malice or displeasure, is prohibited by the laws of this realm; for in a settled state, governed by law, no man, for any injury whatsoever, ought to use private revenge. 3 *Inst.* 157.

It is also against the law of nature, and of nations, for a man to be judge in his own cause; especially, where fury, wrath, malice, and revenge, are the rulers of the judgment. *Id.*

And although upon the single combat no death ensue, nor blood be drawn, yet the very combat for revenge is an affray, and a great breach of the king's peace; an affright and terror to the king's subjects; and is to be punished by fine and imprisonment, and to find sureties for the good behaviour; for it is with force and arms, and against the peace of our lord the king; and in respect of incroachment upon royal authority for revenge, it is against his crown and dignity. *Id.* 158.

And where one party kills the other, it comes within the notion of murder, as being committed by malice aforethought; where the parties meet avowedly with an intent to murder, thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives, and the lives of others, without any warrant for it, either human or divine; and therefore the law hath justly fixed on them the crime and punishment of murder. 4 *Black.* 199.

But if two persons fall out upon a sudden occasion, and agree to fight in such a field, and each of them goeth to fetch his weapon, and they go into the field, and therein fight, and the one killeth the other, this is no malice pre-pensed; for the fetching of the weapon, and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled: but if there were deliberation, as that they meet the next day, nay, though it were the same day, if there were such a competent distance of time, that in
common

common presumption they had time of deliberation, then it is murder. 3 *Inst.* 51. 1 *Hale's Hist.* 453.

And the law so far abhors all duelling in cold blood, that not only the principal, who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not. And it is holden, that the seconds of the party slain are likewise guilty as accessaries. 1 *Haw.* 82.

DUKE, is a name of dignity, and takes place next after the royal family. Among the *Saxons*, the name of *dukes* (*duces*) was frequent, and signified, as among the *Romans*, the *leaders* or commanders of their armies: but after the *Norman* conquest, our kings themselves continuing for many generations *dukes* of *Normandy*, they would not honour any subjects with that title, till the time of *Edward* the third; who, claiming to be king of *France*, and thereby losing the ducal in the regal dignity, created his son *Edward* the Black Prince, duke of *Cornwall*; and many, of the royal family especially, were afterwards raised to the same honour. In the reign of queen *Elizabeth*, the whole order became extinct; but it was revived by her successor king *James* the first, in the person of *George Villiers*, duke of *Buckingham*; and in the succeeding reigns, many of the nobility have been advanced to that dignity. 1 *Black.* 397.

DUM FUIT INFRA ÆTATEM, is a writ which lies for a person of full age, after having, when under age, aliened his lands.

DUM FUIT NON COMPOS MENTIS, is a writ which lies for one who hath recovered his understanding, after having, when *non compos*, aliened his lands; or for the heir of such alienor.

DUN, *down*, which termination hath varied into *don*, signifying a mountain, or high open place. So that the names of those towns which end in *don*, were either built on hills, or near them, in open places.

DUPLEX QUERELA, an ecclesiastical process. See DOUBLE QUARREL.

DUPLICITY, in pleading. See DOUBLE PLEA.

DURESS,

DURESS, is where one is wrongfully imprisoned, or restrained of his liberty contrary to law, till he executes a bond or other deed to another; or is threatened to be killed or maimed, if he do it not: and a deed so obtained is void in law. It is called *duress*, from the Latin *durities*; of which there are two sorts, *duress* of *imprisonment*, where a man actually loses his liberty; and *duress per minas*, where the hardship is only *threatened* and impending. *Duress per minas*, or by threatening, is either for fear of the loss of life, or else for fear of mayhem, or loss of limb; and this fear must be upon sufficient reason, and such as may fall upon a constant man. A fear of battery, or being beaten, is not *duress*; neither is the fear of having one's house burned, or one's goods taken away, or destroyed; because, in these cases, a man may have satisfaction in damages; but no suitable atonement can be made for the loss of life or limb.
Black. 130.

DYRGE, or *dirge*, a mournful song over the dead; from the Teutonic *dyrke*, *laudare*, to praise and extol; whence it is a laudatory song. *Cowel.*

DYTENUM, a *ditty* or song; as, *venire cum pleno dyteno*, was to sing harvest home. *Ken. Par. Ant.* 320.

E A

E A, *Sax.* the water or river. Hence this appellation is joined to the proper names of places, as *Eaton*, *Winchelsea*, *Swansea*, and other such like. And in some parts of the North, the mouth of a river on the shore, between the high and low water mark, is still called the *ea*.

EALDERMAN, *elderman*, was a man chosen to a place of superiority, on account of his age and experience; as the *senators* were among the *Romans*. Hence the word *alderman* in corporations; and hence the word *earl*, which is only a contraction of *ealderman*.

EARL, is a title of nobility, above a viscount, and next below a marquis. He was anciently called *shireman*, because
the

the earls had each of them the civil government of a several division or shire.

In *Latin* they are called *comites* (a title first used in the empire), because they *accompanied* or attended the king. And after the *Norman* conquest, they were for some time called *counts*, from whence the shires are styled *counties* to this day.

It is now become a mere title, they having nothing to do with the government of the county; which is now intirely devolved on the sheriff, the earl's deputy, or *vice-comes*.

Anciently, there was no earl but who had a shire or county for his earldom. But of later times, the number of earls greatly increasing, they have sometimes for their title some particular part of a county, town, village, or place of residence. Also, besides these *local* earls, there are some personal and *honorary*, as *earl marshal of England*; and others *nominal*, who derive their titles from the names of their families.

In writs, and commissions, and other formal instruments, the king, when he mentions any peer, of the degree of an earl, usually styles him *trusty and well-beloved cousin*; an appellation as ancient as the reign of *Hen. 4.* who being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connexion in all his letters, and other public acts; from whence the usage has descended to his successors, though the reason has long ago ceased.
1 *Black.* 398.

EARNEST, called by the civilians *arraha*, is part of the price paid down on a contract made. If neither the money be paid, nor the goods delivered, nor tender made, it is no contract, and the owner may dispose of the goods as he pleases; but if any part of the price be paid down, or any portion of the goods be delivered by way of earnest, the property of the goods is bound by it. 2 *Black.* 30.

EASEMENT, is defined to be a service or convenience which one neighbour hath of another, by charter or prescription, without profit; as a way through his land, a sink, a watercourse, a washing place, or such like. *Kitch.* 105. But a multitude of persons cannot *prescribe* for an easement, but for this they may plead *custom*. *Cro. Ja.* 170.

EAVES-

EAVES-DROPPERS, are persons that listen under windows, or eves or droppings of houses, to listen after discourse, and thereupon frame slanderous and mischievous tales. They are a common nuisance, and presentable at the court leet; or are indictable at the sessions, and punishable by fine, and finding sureties for their good behaviour. 4 Black. 168.

ECCLESIASTICAL COURT, is that which is holden by the king's authority as supreme governor of the church, in matters which chiefly concern religion. Wood. b. 4. c. 1.

The jurisdiction of the ecclesiastical court is either *voluntary* or *contentious*. 1. *Voluntary* is, where there is no opposition, which consists in visiting churches, the clergy, and churchwardens of the several parishes and districts; in granting sequestrations, institution and induction to vacant benefices, licences, dispensations, probates of wills, administrations of intestates effects, and the like. 2. *Contentious*; which is, where there is plaintiff and defendant, in causes of various kinds; as, profanation of the Lord's day, neglect of duty in ministers, disturbance of divine service, providing books and ornaments for the church, jactitation of marriage, divorce, alimony, defamation, payment of tithes, mortuaries, synodals, procurations, dilapidations, reparation of churches, seats in churches, church rates, wills and administrations when contested, and many other such like. *Id.*

The proceedings in the ecclesiastical court are regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law. For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the *Roman* law, yet if they be manifestly repugnant to the fundamental maxims of the municipal law of this realm; as (for instance) if they require two witnesses to prove a fact where one will suffice at common law, in such cases a prohibition will be awarded against them. 3 Black. 100.

Their ordinary course of proceeding is, first, by *citation*, to call the party injuring before them. Then by *libel*, or articles drawn out in a formal allegation, to set forth the plaintiff's ground of complaint. To this succeeds the defendant's *answer* upon oath. If he denies or extenuates the charge, then they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the

the

the court. If the defendant hath any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is intitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. But a man is not obliged to answer upon oath to any matter which may charge himself with a criminal offence. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of the judge, who takes information by hearing advocates on both sides, and thereupon forms his *interlocutory decree*, or *definitive sentence*, at his own discretion; from which there generally lies an *appeal*, in the several stages and gradations, from the archdeacon to the bishop, from the bishop to the archbishop, and from the archbishop to the delegates. But by the statute 25 *Hen. 8. c. 19.* if the decree be not appealed from in fifteen days, it is final. *Id.*

EGYPTIANS. See GYPSIES.

AN EJECTMENT, properly speaking, lieth, where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder man, or any stranger, doth eject or oust the lessee of his term: in this case, he shall have this writ of ejectment, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages. 3 *Black.* 199.

Since the disuse of real actions, this manner of proceeding is become the common method of trying the title to lands or tenements. *Id.* 200.

In strictness, in order to maintain the action, the plaintiff must make out four points before the court, viz. *title*, *lease*, *entry*, and *ouster*. First, he must shew a good *title* in the lessor, which brings the matter of right intirely before the court; then, that the lessor, being seised by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute, by delivering him the undisturbed and peaceable possession of his term. *Id.* 202.

But

But as much trouble and formality were found to attend the actual making of the *lease*, *entry*, and *ouster*, a new and more easy method of trying titles by writ of ejectment was invented, which depends intirely upon a string of legal fictions; no actual *lease* is made, no actual *entry* by the plaintiff, no actual *ouster* by the defendant; but all are merely ideal, for the sole purpose of trying the title. *Id.*

To this end, on application to the court by the tenant in possession to be made defendant in the action, it is allowed to him upon this condition, that he enter into a rule to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action, viz. the *lease*, *entry*, and *ouster*; which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will now stand upon the merits of the title only. *Id.* 203, 4.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate, amounting commonly to one shilling or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that has right, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession hath wrongfully received; which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession, whether he be made party to the ejectment, or suffers judgment to go by default. *Id.* 205.

Such is the modern way, of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate, and hath succeeded to those real actions, as being infinitely more convenient for attaining the end of justice; because, the form of the proceeding being intirely fictitious, it is wholly in the power of the court to direct the application of that fiction so as to prevent fraud and chicane, and to discover the real truth of the title: the writ of ejectment and its nominal parties are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented,

invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side. 3 *Black.* 205. *Burr. Mansf.* 668.

But a writ of ejectment is not an adequate means to try the title of all estates. For where the entry is taken away by disseisin, descents, fines, and recoveries, and non-claim, no ejectment lies. So it doth not lie of an advowson, a rent, a common, or other incorporeal hereditament (except for tithes, by virtue of the statute of 32 *H. 8. c. 7.*); for on such things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Nor will an ejectment lie, where the defendant has been twenty years in possession, by the statute of limitations. For an ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. Therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant. It is not a bar only to the action or remedy of the plaintiff, but rather takes away his right of possession, and in that case the plaintiff will be driven to his writ of right. 3 *Black.* 206. *Burr. Mansf.* 119.

The usual course in practice is, to draw a declaration, and therein to feign a lease to a lessee, or to him that would try the title; and to feign a casual ejector or defendant in the said declaration; and then to deliver the declaration to the ejector named therein, who sends or delivers it to the tenant in possession, and gives him notice in writing at the bottom, or on the back thereof, to appear and defend his title; otherwise that he the feigned defendant will suffer judgment by default, whereby he the true tenant will be turned out of possession. To this declaration the true tenant may appear by his attorney, and consent to a rule to make him defendant in the place of the casual ejector or feigned defendant, and to confess a lease, entry, and ouster, and at the trial to stand upon the title only. *Wood. b. 4. c. 4.*

Where the person himself cannot be come at, leaving a copy at his house with some person there, or if no one can be met with, affixing a true copy of it on the door, shall be deemed a good service. *Burr. Mansf.* 1116. 1181.

EIGNE, Fr. *eldest*, or first-born; as *bastard eigne* and *mulier puisne*, are words used in our law, for the elder a bastard, and the younger legitimate.

EIRE, Fr. (*iter*,) was the court of justices itinerant, who were sent once in seven years with a general commission into divers counties, to hear and determine such causes as were termed pleas of the crown.

The *eire of the forest*, is the same as the court called the *justice seat*, which was held once in three years by the justices itinerant of the forest.

ELECTION, is when a man is left to his own free will to take or to do one thing or another, which he pleases.

In all cases, where several remedies are given, the law which gives the remedies to the party, gives him withal election to take which of the remedies he will. 1 *Inst.* 145.

If a man grant by his deed a rent-charge to another, and the rent is behind, the grantee may chuse whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind; but he cannot do both. *Litt. sect.* 219.

Where election is given to several persons, the first election made by any of them shall stand. 1 *Inst.* 145.

If a man grant a manor, except one close called *N.* and there are two closes called by that name, one containing nine acres, and the other only three acres, the grantee shall not in this case chuse which of the said closes he will have, but the grantor shall have election which close shall pass. 1 *Leon.* 268.

But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 *Leon.* 30.

If a man hath an election to do one of two things, and one of them becomes impossible, he must at his peril do the other. 1 *Lill. Abr.* 506.

A person who hath brought a civil action for an injury, shall not be suffered to proceed criminally by way of information at the same time, but shall make his election in which method he will proceed, before the court will enter into the criminal complaint. *Burr. Mansf.* 720.

If a bill in equity be brought, whilst an action at law is carrying on upon the same account, the lord chancellor will oblige the plaintiff to make his election in which way he will proceed. 2 *Atk.* 166.

But where a creditor sues an executor at law, and at the same time files his bill against him in equity, the court will not

not require him to make his election, in case the executor is attempting to prefer other creditors before him, by confessing judgments to them. *Barn. Cha. Ca.* 278.

ELEGIT, is a writ of execution, which is given by the statute 13 *Ed. 1. c.* 18. either upon a judgment for debt or damages, or upon the forfeiture of a recognizance taken in the king's court. 1 *Inst.* 289.

By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands, by the writs of *fieri facias* or *levari facias*; but not the possession of the lands themselves: so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ, which is called an *elegit*, because it is in the election of the plaintiff whether he will sue out this writ or one of the former. 3 *Black.* 418.

By this writ the sheriff shall deliver to the plaintiff all the goods and chattels of the debtor (except oxen and beasts of the plough), and a moiety of his lands: and this must be done by an inquest to be taken by the sheriff. 1 *Inst.* 289.

The other moiety of the lands was originally reserved for the lord to distrain for his services. And hence it is, that to this day copyhold and other like customary lands are not liable to be taken in execution upon a judgment. 3 *Black.* 418, 9.

This execution, or seising, of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken. But if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a writ may be had to take the body of the defendant. *Id.* 419.

During the time that the plaintiff holds the lands so delivered to him, he is called tenant by *elegit*. Yet he hath only a chattel interest therein; and therefore it shall not go to his heir, but to his executor, who is intitled to the debt, for the payment whereof this land is a remedy or security. 2 *Black.* 161.

ELISORS (*electors*), are two persons appointed by the court to return a jury, when the sheriff and the coroners have been challenged as incompetent. In this case, the electors return the writ of *venire* directed to them, with a panel of the jurors names. And their return is final, no challenge being allowed to their array. 3 *Black.* 354.

ELOIGNE (Fr. *espoigne, elongata*), is when the sheriff, to a writ of replevy, returns that the goods are *elongata*, carried a long way off, to places to him unknown; in which case, the party replevying shall have a writ of *capias in withernam*, a term which signifies another or reciprocal distress of the goods of the distrainer, in lieu of the distress formerly taken by him, and eloigned or withheld from the owner: so that here is now distress against distress, one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer. For which reason, goods taken in *withernam* cannot be replevied, till the original distress is forthcoming. 3 *Black.* 148.

ELOPEMENT, is where a married woman, of her own accord, goes away and departs from her husband, and lives with an adulterer. A woman thus leaving her husband is said to *elope*; and in this case her husband is not obliged to allow her any alimony out of his estate, nor shall he be chargeable for necessaries for her; and, where the same is notorious, whoever gives her credit doth it at his peril.

EMBARGO, is a prohibition upon shipping not to go out of any port. This the king can enjoin in time of war by virtue of his prerogative; but, in time of peace, this may not be done without an act of parliament. 1 *Black.* 271.

EMBLEMENTS, signify properly the profit of land sown; but the word is sometimes used more largely, for any products that arise naturally from the ground; as corn, fruit, and the like.

If the lessee, being tenant *at will*, sow the land, and the lessor after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if tenant *for years*, who knows the end of his term, sows the land, and his term ends before the corn is ripe; in this case the lessor or he in reversion shall have the corn, because the lessee knew the certainty of his term, and when it would end. *Litt.* 68.

And the reason why the tenant at will shall have the corn is, because his estate is uncertain; and therefore, lest the ground should be unmanured, which would be hurtful to the public, he shall reap the crop which he sowed in peace, although

although the lessor determine his will before it be ripe. And so it is if he set roots, or sow hemp, or flax, or any other annual profit; if, after the same be planted, the lessor oust the lessee, or if the lessee die, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns, there the lessor may put him out notwithstanding, because they will yield no annual profit.

So if tenant *for life* sows the ground, and dies, his executors shall have the corn, because his estate was uncertain, and determined by the act of *God*.

But if a woman that holds land *during her widowhood* sows the ground, and taketh husband, the lessor shall have the corn, because the determination of her estate grew by her own act.

If a man seised of lands in fee hath issue a daughter, and dieth, leaving his wife ensient with a son, the daughter sows the ground, the son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of *God*.

Where there is a right to emblements, ingress, egress, and regress, are allowed by law to enter, cut, and carry them away, when the estate is determined. 1 *Inst.* 55. 2 *Inst.* 81. 1 *Roll's Abr.* 727.

EMBRACERY, is an attempt to corrupt or influence a jury, or any way incline them to be more favourable to the one side than the other, by money, promises, letters, threats, or persuasions; whether the juror on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. 1 *Haw.* 259.

The punishment of an embraceor is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes) perpetual infamy, imprisonment for a year, and forfeiture of tenfold the value. 4 *Black.* 140.

EMBRING DAYS (from *embers*, ashes), are certain extraordinary days of fasting, wherein, by way of greater humiliation, the people fast in ashes; who being at the same time habited in the coarser kind of cloth, are represented as repenting in sackcloth and ashes.

ENDOWMENT (Lat. *dos*, *dower*), is the widow's portion; being a third part of all the freehold lands and tene-

ments of which her husband was seized at any time during the coverture. Of lands, not freehold, her portion varies according to the custom in different places. Sometimes the word *endowment* is used metaphorically for an assignment of a provision for a clergyman on erecting a church or chapel; and more particularly it was a portion of tithes set out for a vicar towards his perpetual maintenance when the benefice was appropriated to some of the religious houses.

ENGLESCHIRE, was anciently an amercement on the murder of a *Dane* by an *Englischman*. It was introduced by king *Canute*, to prevent his countrymen, the *Danes*, from being privily murdered by the *Englisch*; and was afterwards continued by *William* the Conqueror, for the like security to his *Normans*. And, therefore, if, upon inquisition had, it appeared that the person found slain was an *Englischman*, the country was excused from this burden. But this was abolished by the statute 14 *Ed. 3. c. 4.* which enacts, that because many mischiefs have happened in divers counties, which had no knowledge of presentment of *Engleschire*, whereby the commons of the counties were often amerced before the justices in eyre; therefore no justice errant from henceforth shall put in any article of presentment of *Engleschire*, against the commons of the counties or any of them, but the *Engleschire* and presentment of the same be wholly out and void for ever, so that no person by this cause may be henceforth impeached.

According to some authors, *Engleschire* was the proof that the party slain was an *Englischman*. *Bract. lib. 3. tr. 2. c. 15.* *Fleta, l. 1. c. 30.*

ENGLISH TONGUE. By the 4 *G. 2. c. 26.* & 6 *G. 2. c. 14.* all law proceedings (except technical words) shall be in the *Englisch* language, and written in a common legible hand and character, and not in any hand commonly called *court hand*, on pain of 50*l.* to him who shall sue for the same.

ENTRY into lands is, where the legal owner takes possession against another who hath entered without any right at all. In this case, the party intitled, without the formality of bringing his action, may enter peaceably upon the land, declaring that thereby he takes possession; or he may enter on any part of the land in the same county, declaring it to be in the name of the whole; but if it lie in different counties, he must make different entries. 3 *Black. 174.*

If

If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities : which claim is in force for a year and a day only. And therefore this claim, if it be repeated once in the space of every year and day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry. *Id.* 175.

But if the disseisor die, and the lands descend to his issue, this takes away the entry of the right owner, because the law casts the lands upon the issue by force of the descent: and therefore as the issue comes to the lands by course of law, and not by his own act, the law so far protects his title, that it will not suffer his possession to be divested, till the claimant hath proved a better right. *Id.* 176.

ENTRY, writ of, is a writ directed to the sheriff, requiring him to *command* the tenant of the land, that he *render* to the demandant the premises in question, or appear in court on such a day, and shew why he hath not done it. And this is what is called, from the emphatical words in the writ, *præcipe quod reddat*. Of this writ there are four kinds: 1. A writ of entry *sur disseisin*, that lieth for the disseisee against the disseisor, upon a disseisin done by himself; and this is called a writ of entry in the nature of an assize. 2. A writ of entry *sur disseisin in the per*, for the heir by descent, who is said to be in the *per*, as he comes in *by* his ancestor. 3. A writ of entry *sur disseisin in the per and cui*, where the feoffee of a disseisor maketh a feoffment over to another; and then the form of a writ is, that the tenant had no title to enter, but *by* a prior alienee, *to whom* the intruder demised it. 4. A writ of entry *sur disseisin in the post*, which lies when *after* a disseisin the land is removed from hand to hand in case of a more remote feisin, whereunto the other three degrees do not extend. 1 *Inst.* 238.

But all these writs are now entirely out of use; only the forms of them are preserved in the practice of common recoveries. But the title of lands is now usually tried upon actions of ejectment or trespass.

EQUES AURATUS, is a knight so called from the gilt spurs that he wore. Hence in ancient charters, by way of a quit-rent, the tenant was bound to render to the lord yearly a pair of gilt spurs.

EQUITY, is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief or cause of making of the same, shall be within the same remedy that the statute provideth. And the reason hereof is, for that the law maker could not possibly set down all cases in express terms. 1 *Inst.* 24. For example: The statute of *Gloucester* gives action of waste against him that holds lands for life or years; and by the equity thereof a man shall have action of waste against a tenant that holds but for one year or half a year, which is without the words of the act, but within the meaning of it; and the words that enact the one do by equity enact the other. *T. L.* 303. In like manner, a case out of the mischief is out of the meaning of the law, though it be within the letter of it. 2 *Inst.* 106.

EQUITY OF REDEMPTION. In strictness of law, if money lent upon a mortgaged estate be not paid at the day, the estate becomes absolutely forfeited. But herein the courts of equity have interposed: and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to re-call or redeem his estate, paying to the mortgagee his principal, interest, and costs. Which advantage, allowed to mortgagees, is called the *equity of redemption*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of the money immediately, or else call upon the mortgagor to redeem his estate presently; or, in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose the equity of redemption without possibility of recall. Also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. 2 *Black.* 158, 9.

ERROR, writ of, lies for some supposed mistake in the proceedings of a court of record; for to amend errors in an inferior court not of record, a writ of false judgment lies. A writ of error lies only upon matter of *law* arising upon the face of the proceedings, so that no *evidence* is required to substantiate or support it; and there is no method of reversing an error in the determination of *facts*, but an *attaint* (which is now out of use), or by a *new trial*, which is now the common practice. This writ lies from the inferior courts of

of record in *England* into the king's bench, and from the king's bench in *Ireland* to the king's bench in *England*. It may likewise be brought from the common pleas at *Westminster* to the king's bench, and then from the king's bench the cause is removeable to the house of lords. From proceedings on the law side of the exchequer, a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the courts of king's bench and common pleas, and from thence to the house of lords. From proceedings in the king's bench in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun there by bill (except where the king is party), it lies to the exchequer chamber, before the justices of common pleas and barons of the exchequer, and from thence also to the house of lords: but where the proceedings in the king's bench do not first commence therein by bill, but by original writ sued out of chancery, the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the final resort for the decision of every civil action. 3 *Black.* 406.

ESCAPE:

1. An *escape* is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *T. L.*

2. Escapes are either in *civil* or *criminal* cases; and in both respects, escapes may be distinguished into *voluntary* and *negligent*; *voluntary*, where it is with consent of the keeper; *negligent*, where it is for want of due care in the keeper.

3. In *civil* cases: After the prisoner hath been suffered voluntarily to escape, the sheriff can never after retake him, but the sheriff must answer for the debt: but the plaintiff may retake him at any time. In the case of a negligent escape, the sheriff, upon fresh pursuit, may retake the prisoner; and the sheriff shall be excused, if he hath him again before any action brought against himself for the escape.

When a defendant is once in custody in execution, upon a *capias ad satisfaciendum*, he is to be kept in close and safe custody; and if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon for his whole debt: for though upon arrests, and what is called *mesne process*, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 *W. c.* 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plain-
tiff

riff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence; for in that case confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. 3 *Black.* 415, 6.

A rescue of a prisoner in execution, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, seeing he may command the power of the county. *Id.* 416.

4. In *criminal* cases: An escape of a person arrested, by eluding the vigilance of his keeper before he is put in hold, is an offence against public justice, and the party himself is punishable by fine and imprisonment: but the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner, who has the natural desire of liberty to plead in his behalf. Officers therefore, who after arrest *negligently* permit a felon to escape, are also punishable by fine: but *voluntary* escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass; and this, whether he were actually committed to gaol, or only under a bare arrest. But the officer cannot be thus punished, till the original delinquent is actually found guilty or convicted by verdict, confession, or outlawry, otherwise it might happen that the officer should be punished for treason or felony, and the party escaping, turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 4 *Black:* 129.

By the statute 16 G. 2. c. 31. to convey to any person in custody for *treason* or *felony* any arms, instrument of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony and transportation for seven years: or if the prisoner be in custody for *petit larceny*, or other *inferior offence*, or charged with a debt of 100*l.* it is then a misdemeanor, punishable by fine and imprisonment.

ESCAPE WARRANT, is where a person committed or charged in custody in the king's bench or Fleet prison, in execution, or on mesne process, goes at large; then an oath thereof made before a judge of the court where the action

was

was brought, a warrant shall be issued, directed to all the sheriffs and other officers throughout *England*, to retake the prisoner, and commit him to gaol where taken, there to remain till the debt shall be satisfied.

ESCHEAT, from the French *eschoir*, to happen, signifies chance or accident, and in our law denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case, the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee. 2 *Black.* 244.

Escheat happens either for *want of heirs* of the person last seised, or by his *attainder* for a crime by him committed; in which latter case, the blood is tainted, stained, or corrupted, and the inheritable quality of it is thereby extinguished.

Escheat whereby the descent is impeded for want of heirs is, where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations of those ancestors, paternal or maternal, from whom his estate descended; or where he dies without any relations of the whole blood. Bastards also are incapable of inheritance; and therefore if there be no other claimant than such illegitimate children, the land shall escheat to the lord: and, as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies; and therefore if a bastard purchase lands, and dies seised thereof without issue and intestate, the land shall escheat to the lord of the fee. Aliens also, that is, persons born out of the king's allegiance, are incapable of taking by descent; and, unless naturalized, are also incapable of taking by purchase; and, therefore, if there be no natural-born subject to claim, such lands in like manner shall escheat.

By attainder for treason or other felony, the blood of the person attainted is so far corrupted, as to be rendered no longer inheritable. But in this case a difference is to be noted, between *forfeiture* of lands to the king, and *escheat* to the lord of the fee. Before the introduction of feuds, part of the punishment for such offence was forfeiture of lands to the crown; afterwards, escheats being introduced in consequence of the feudal tenure, they operated in subordination, as it were, to this more ancient and superior law of forfeiture.

The doctrine of escheat upon attainder is properly this; that the blood of the tenant, by the commission of any felony
(under

(under which denomination all treasons were formerly comprized), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vafal on the implied condition of his well demeaning himself. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revelt in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of efcheat.

As a consequence of this doctrine of efcheats, all lands of inheritance immediately revelt in the lord, the wife of the felon was liable to lose her dower, till the statute 1 *Ed. 6. c. 12.* enacted, that albeit any person be attainted of mifprifion of treason, murder, or felony, yet his wife fhall enjoy her dower. But ſhe has not this indulgence where the ancient law of forfeiture operates; for it is provided by the ſtatute 5 & 6 *Ed. 6. c. 11.* that the wife of one attainted of high treason fhall not be endowed at all. 2 *Black. c. 15.*

ESCHEATOR, was an officer appointed in every county, whoſe employment was, in caſe of the death of any of the king's tenants *in capite*, to take the lands into the king's hands, and to inquire by a jury, how much land ſuch tenant held, what was the yearly value thereof, who was his heir, and of what age, that the king might be answered of the wardſhip and marriage of ſuch tenant, if he or ſhe were within the age appointed by law.

ESCROW, is a deed delivered, not to the grantee, but to a third perſon, to hold till ſome conditions be performed on the part of the grantee; in which caſe, it is not delivered as a deed, but as an eſcrow; that is, as a *ſcrowl* or *writing*, which is not to take effect as a deed, till the conditions be performed; and then it is a deed to all intents and purpoſes. 2 *Black. 307.*

ESCUAGE, *ſcutagium*, ſervice of the ſhield, was where a man holding lands by knights ſervice was obliged to attend the king perſonally in his wars; and was afterwards changed into a pecuniary compenſation. 1 *Inſt. 68.*

ESPLEES (*expletia*, from *expleo*), are the products which ground or land yield, as the hay of the meadow, the herbage
of

of the pasture, corn of the arable, rents and services. So of an advowson, the taking of tithes in gross by the parson; of wood, the felling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll: these, and such like issues are termed *esplees*. In a writ of right of land, of an advowson, or the like, the demandant ought to allege in his count, that he or his ancestor took the esplees of the thing in demand; otherwise the pleading will not be good. *T. L.*

ESQUIRE, *escuyer*, *scutarius*, called by the Saxons *schilt knaben* (*shield-knave*, the word *knave* having anciently signified *servant*), is a name of dignity, next above the common title of *gentleman*, and below a *knight*. Heretofore it signified one that was attendant, and had his employment as a servant, waiting on such as had the order of knighthood, bearing their shields, and helping them to horse, and such like. And this title is of that nature with us now, that to whomsoever either by blood, or place in the state, or other eminency, we conceive some higher attribute should be given than the sole title of gentleman, knowing yet that he hath no other honorary title legally fixed on him, we usually style him an esquire, in such passages as require legally that his degree or state be mentioned. *Seld. Tit. of Honour.*

Mr. Camden reckons up four species of esquires, particularly regarded by the heralds: 1. The eldest sons of knights, and their eldest sons, in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons, in like perpetual succession. Both of which species are esquires by birth. 3. Esquires created by the king's *letters patent*, or other investiture, and their eldest sons. 4. Esquires by virtue of their *office*, as justices of the peace, and others who bear any office of trust under the crown.

Those which were created by patent or investiture, were called *esquires of the king*, and wore a collar of SS. and had a pair of silver spurs (by way of distinction from the knights, who had gilt spurs), and they attended upon the king in war, and carried his shield before him.

Unto these may be added all *Irish* and foreign peers, and also the eldest sons of peers of *Great Britain*; for all these are only esquires in our law, and must be so named in all legal proceedings. 1 *Black. 406.*

ESSOIN, *essonium*, is derived of the French *essonier*, or *exonier*, which signifies to excuse; so as an *essoin*, in legal understanding,

understanding, is an excuse of a default by reason of some impediment or disturbance, and is as well for the plaintiff as for the defendant, and is all one with that which the civilians call *excusatio*: It is a craving of further time. Of essoins there have been five kinds: 1. De servitio regis. 2. In terram sanctam. 3. Ultra mare. 4. De malo lecti. 5. De malo veniendi; and this is the common esoin. 2 *Inst.* 125. The esoin day in court is regularly the first day of the term, but the fourth day after is allowed of favour. *Wood. b. 4. c. 1.*

ESTATE, in lands, tenements, and hereditaments, signifies such interest as the tenant has therein: so that if a man grant *all his estate* to such an one and his heirs, every thing that he can possibly grant shall pass thereby. It is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property. 2 *Black.* 103.

ESTOPPEL, is so called because thereby a man is *stopped* or concluded from saying any thing against his own act. Of estoppels there are three kinds; by matter of record; by matter in writing; and by matter without writing. 1. By matter of record; as by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. 2. By matter in writing; as by deed indented, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll. 3. By matter without writing; as by livery, by entry, by acceptance of rent, by partition. 1 *Inst.* 352.

Every estoppel ought to be reciprocal; that is, to bind both parties: and this is the reason that regularly a stranger shall neither take advantage nor be bound by estoppel. Privies in blood as the heir, privies in estate as the feoffee or lessee, privies in law as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the post, shall be bound by and take advantage of estoppels. *Id.*

If a man is bound in an obligation by a wrong name, and afterwards is sued by that name on the obligation, he shall not be received to say in abatement that he is misnamed, but shall answer according to the obligation, though it be wrong: and forasmuch as he is the same person that was bound, he is estopped and forbidden in law to say contrary to his own deed; otherwise he might take advantage of his own wrong, which the law will not suffer. *T. L.*

ESTOVERS (from *estoffer*, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm. And this any tenant may take from off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. 2 *Black.* 35.

Also in a divorce between husband and wife, where the law allows unto her alimony but of her husband's estate, this is sometimes called her *estovers*: for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis*, in order to recover it. 1 *Black.* 441.

ESTRAYS, are such goods as are found in any manor or lordship, and no man knows the owner of them: in which case they belong to the king, or to the lord of the manor by special grant from the crown. 1 *Black.* 297.

But in order to vest an absolute property in the king, or his grantee, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claim them within a year and day after such proclamation, the owner hath lost all further property therein: but if they be not proclaimed, the owner may take them again at any time. *Id.*

Any animal may be estray, that is by nature tame or reclaimable, and in which there is a valuable property, so as that the same may be a sufficient pledge for the expence of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to feed it and keep it from damage, and may not use it by way of labour, as to ride an horse or the like, but is liable to an action for so doing. Yet he may milk a cow, or do any thing which tends to the preservation, and is for the benefit of the animal. *Id.* 298.

An estray ought to be put in some several ground in some open place, and not in any covert of wood, that the owner may have a view of it; for if it be in covert, the property is not changed, though it be there a year and a day. *Kitch.* 23.

The owner, if it be within the year and day, may take it without telling any marks, or making proof of property; but this may be done upon the trial, if contested. 2 *Salk.* 686.

And the lord ought to make a demand of what the amends should be; and then if the owner thinks the demand unreasonable,

reasonable, he may tender sufficient amends; and if the lord shall not accept it, this shall be settled by the jury upon trial. But it is enough in this case to tender amends *generally*, without expressing any certain sum. For this differs from the tender of amends for trespass, where, if a man pleads a tender, he must shew what he tendered, and the law puts this difficulty upon him, because he is the wrong doer: but the owner of the stray is no wrong doer; and he cannot know how long his beast hath been in the lord's custody, nor how much will make a proper satisfaction. *Id.*

If the stray within the year stray out of the manor, the lord may chase it back, unless it be seized by another lord who hath estrays; but if it be seized by such other lord, the first hath no possibility of recovering it, for until the year and day be past, he hath no property therein; and the second must proclaim it again. *Kitch. 81.*

ESTREAT, *extractum*, is used for a true copy or note of some original writing or record, and especially of fines and amercements imposed in the rolls of a court, and *extracted* or drawn out from thence, and certified into the court of exchequer; whereupon process is awarded to the sheriff to levy the same. And all clerks of the peace and town-clerks shall, within twenty days after *Sept. 20*, yearly, deliver to the sheriff a true estreat of all fines and forfeitures in their respective courts; and shall, before the second *Monday* after the morrow of *All Souls*, yearly deliver into the exchequer a duplicate thereof, and shall then make oath of the truth of the same. 22 & 23 C. 2. c. 22. 4 & 5 W. c. 24.

ESTREPEMENT, is an old French word, and signifies waste or *extirpation*. It is a writ which lay at the common law to prevent the committing of waste; but now the most usual way of preventing waste is by injunction out of a court of equity. 3 *Black. 227.*

EVIDENCE:

I. EVIDENCE, *what*. Evidence, in legal understanding, doth not only contain matters of record, as letters patent, fines, recoveries, inrollments, and the like; and writings under seal, as charters and deeds; and other writings without seal, as court rolls, accounts, and such like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given for the finding of any issue joined between

between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. 1 *Inst.* 283.

2. *The best evidence is required.* One general rule that runs through the whole doctrine of evidence is this, that the best evidence that can be had shall be required. Thus, in order to prove a lease for years, nothing less shall be admitted but the very deed of lease itself, if in being; but if it be positively proved to be burned or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced, or parol evidence given of its contents. 3 *Black.* 368.

3. *Written evidence.* Evidence is of two kinds, written evidence, and the evidence of witnesses. Written evidence is various: such as *acts of parliament*; which, if public acts, are to be taken notice of by the court, without being proved; but private acts must be proved by copies thereof compared with the parliament roll. *Theory of Evid.* 2. 8.

Records of the king's courts prove themselves. But if copies of them are produced, they must be proved by witnesses to be true copies. 10 *Co.* 92. So also of public matters which are *not of record*, as the court rolls of a manor; for they are the public rolls by which the inheritance of every tenant is preserved. *Theory of Evid.* 22, 3.

Depositions of witnesses taken in a court of record may be read, when the witness is dead; but not when the witness is living; for then they are not the best evidence that the nature of the thing is capable of; unless it shall appear that the witness hath been sought, and cannot be found. *Id.* 30.

A *verdict* shall not be given in evidence, but between such who were parties or privies to it: neither shall it be admitted without producing a copy of the judgment founded upon it; because it might be that the judgment was arrested. *Id.* 18; 19. 21.

A *decree* in equity may be given in evidence between the same parties or all claiming under them. *Id.* 36.

In cases where deeds have been *destroyed* by burning of houses, by rebellion, by robbers; or where the defendant himself has the deed which concerns the land in question, and will not produce it, a copy of it hath been admitted, or an abstract, or even parol evidence of the contents. *Id.* 54.

The *confession* of the defendant taken before justices of the peace is allowed to be given in evidence against the party confessing, but not against others. 2 *Harv.* 429.

A copy of the *probate of a will* is good evidence, where the will itself is of chattels; for there the probate is an original taken by authority, and of a public nature: otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and the copy of it is no more than the copy of a copy. 3 *Salk.* 154. So the copy of a *church register*, of *town books*, and the like, are good evidence. *L. Raym.* 154.

A *shop book* shall not be allowed in evidence on an action for money due for wares delivered above a year before the action brought. 7 *Ja. c.* 12.

A man's *book of accounts* is no evidence for the owner of the book, but for the adverse party; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per Pais.* 348.

Similitude of hands is no evidence; but saying that he was well acquainted with his writing, and knew it to be his writing, is evidence: and in some circumstances this is not necessary; as where the handwriting to be proved is of a person residing abroad, one who hath frequently received letters from him in a course of correspondence, hath been admitted to prove it, though he had never seen him write. *Theory of Evid.* 25.

4. *Evidence of witnesses.* An *infant* of the age of fourteen years may be sworn, for that is by law limited to be the age of discretion. And in some cases an infant of tender years may be examined, which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children: but in no case shall an infant be admitted as evidence without oath. *Str.* 700. 1 *Atk.* 29.

If a *juror* is a witness in a cause, he ought to be sworn openly in court, where he may be cross-examined, and not report the matter privately to his companions. *Bac. Abr. Evid.*

An *attainder* of felony, perjury, or forgery, or a judgment for any heinous crime, are good causes of exception against a witness. But no such conviction or judgment can be made use of to this purpose, unless the record be produced in court. And it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to

be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

It is an uncontested rule, that it is a good exception against a witness, that he is either to be a *gainer* or *loser* by the event of a cause, whether such advantage be direct and immediate, or consequential only. Except in criminal cases, where, from the necessity of the thing, interested persons are allowed as witnesses, otherwise in many cases it would be impossible to convict offenders; as particularly in the case of robbery. 1 *Haw.* 433.

A *trustee* may be a witness if he hath released his trust, but not if he hath conveyed it over. *Sid.* 315.

An *heir at law* may be a witness concerning the title to the land, but the *remainder man* cannot, for he hath a present interest, but the heirship is a mere contingency. 1 *Salk.* 283.

If a man hath been examined on interrogatories, being at that time disinterested, and *afterwards* becomes interested, his deposition may be given in evidence; because his evidence must be taken as it stood at the time of his examination. So if a witness to a bond becomes afterwards the representative of the obligee, his hand must be proved as if he were dead. 2 *Atk.* 615.

Ancient deeds of *thirty years* standing prove themselves; and need not witnesses to prove the handwriting. 3 *Black.* 367.

No evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts. *Id.* 368. For, generally, no evidence ought to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such speech makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross-examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. *Theory of Evid.* 111.

In the case of *Doe* on the several demises of *Church* and *Phillips v. Perkins* and others, T. 30 G. 3. it was adjudged,
Y 2
that

that a witness may refresh his memory by *any* book or paper, provided he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, then the *original* book or paper must be produced, for he shall not be allowed to give evidence from a copy or extract from it. *Caf. by Durnf. and East, 3 V. 749.*

5. *Process to cause witnesses to appear.* Process to cause witnesses to appear (in civil cases) is by writ of *subpoena ad testificandum*: which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of 100*l.* to be forfeited to the king; to which the statute 5 *El. c. 9.* hath added a penalty of 10*l.* to the party grieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; unless it be within the bills of mortality. 3 *Black. 369.*

In criminal cases, if a witness hath been bound over, and do not appear, he shall forfeit his recognizance.

6. *Manner of giving evidence.* He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence; for a negative regularly cannot be proved: And therefore it is sufficient to deny what is affirmed, until it be proved. But when the affirmative is proved, the other side may contest it with opposite proofs; for this is not properly proving a negative, but the proof of something totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as, that he was at another place at the time. *Theo. of Evid. 116.*

The counsel of that party which begins to maintain the issue, ought to conclude. *Tr. per Pais. 220.*

EWAGE (from the French *eau*, water), is toll paid for water carriage.

EXACTION, is a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. And the difference between exaction and extortion, is this: Extortion is, where an officer extorts more than his due, when something is due to him:

Exaction

Exaction is, when he wrests a fee or reward where none is due. For which the offender may be indicted, fined, and imprisoned.

EXAMINATION. If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds, upon examination, that the prisoner is not guilty, yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit, that a man once arrested, and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. In order to which, the examination and information of the parties must be taken; which must be certified to the next gaol delivery. But this examination of the person accused, ought not to be upon oath; but if, upon his examination, he shall voluntarily confess the matter, it may be proper that he set his hand to it; which being afterwards sworn to by the justice or his clerk, may be given in evidence against the party confessing, but not against others. *Dalt. c. 164.*

EXCEPTION, is a stop or stay to an action; and is divided into dilatory, and peremptory. In law proceedings, it is a denial of a matter alleged in bar to the action. And in chancery, it is what is alleged against the sufficiency of an answer, or the like. The counsel in a cause are to take all their exceptions to the record at one time, and before the court hath delivered any opinion therein. 1 *Lill. Abr.* 559.

Exception *in deeds and writings* keeps the things from passing thereby, being a saving out of the deed, as if the same had not been granted; but it must be a particular thing out of a general one, as a room out of an house, a parcel of ground out of a manor, timber-trees out of land. There is a diversity between an *exception* (which is always part of the thing granted, and a thing *in esse*), and a *reservation*, which is always a thing not *in esse*, but newly created or reserved out of the land or tenement demised; as for instance, a rent to be paid to the lessor by the lessee. 1 *Inst.* 47.

Exception to evidence. See BILL OF EXCEPTIONS.

AN EXCHANGE is a mutual grant of equal interests, the one in consideration of the other. 2 *Black.* 323.

An exchange may be made of things that lie either in grant or in livery. But no livery of seisin, even in ex-

changes of freehold, is necessary to perfect the conveyance: for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for if either party die before the entry, exchange is void, for want of sufficient notoriety. *Ibid.*

Anciently, exchanges of lands lying in the same county, were good without deed; but if the lands were in several counties, or if it were of things that lie in grant, as advowsons, rents, commons, and the like, an exchange of them, although they were in one and the same county, was not good without deed. 1 *Inft.* 50. But now, by the statute of frauds and perjuries, 29 *C. 2. c. 3.* a deed seemeth generally to be required, though the lands lie in the same county: For thereby it is enacted, that no estate or interest, either of freehold or term of years, or any uncertain interest, not being copyhold, or customary interest, of any lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party or his agent, lawfully authorised in writing, or by act and operation of law.

In exchanges, it behoveth, that the estates which both parties have in the lands exchanged, be equal; for if the one granteth that the other shall have his land in fee tail, for the land which he hath of the grant of the other in fee simple, although the other agree to this, yet this exchange is void, because the estates are not equal: In like manner it is, where it is agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail special. So that always it behoveth, that in exchange the estates of both parties be equal; that is, if the one hath a fee simple in the one land, the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land; and so of other estates. But it is not material in the exchange, that the lands be of equal value, but only that they be equal in kind and manner of the estate given and taken. 1 *Inft.* 51.

And there are two things further particularly necessary to the perfection of an exchange. First, that the word *exchange* be used; which is so essential, that it cannot be supplied by any other word, or described by any circumlocution.

Secondly,

Secondly, that there be an execution by entry or claim in the life of the parties. 1 *Inst.* 51.

For the parties have no freehold in deed or in law in them, before they execute the same by entry; and therefore if one of the parties die before the exchange be executed by entry, the exchange is void. 1 *Inst.* 50.

So if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed; and therefore he shall return back to his own. 2 *Black.* 323.

So if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges. *Ibid.*

If an *infant* exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect: for the exchange at first was not void but voidable.

1 *Inst.* 51.

As concerning *dower*; the wife shall not be endowed both of the land given in exchange, and of the land taken in exchange, although the husband was seised of both; but she may have her election to be endowed of which she will, *Ibid.*

EXCHEQUER; is an ancient court of record, set up by *William* the Conqueror, as part of the *avila regia*, though regulated and reduced to its present order by king *Edward* the first; and intended, principally, to order the revenues of the crown, and to recover the king's debts and duties. It is called the *exchequer*, *scaccharium*, from the chequed cloth, resembling a chess board, which covers the table there. 3 *Black.* 43.

It consists of two divisions: the receipt of the exchequer, which manages the royal revenue; and the court, or judicial part of it, which is again divided into a court of *equity*, and a court of *common law*. *Id.* 44.

The court of *equity* is held in the exchequer-chamber, before the lord treasurer, the chancellor of the exchequer, the chief baron, and the three inferior barons. The primary and original business of this court is to call the king's debt-

ors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments; any goods, chattels, or other profits or benefits, belonging to the crown. But by fiction of law, all kinds of personal actions may be now prosecuted in the court of exchequer. *Id.*

And this gives original to the *common law* part of their jurisdiction, which was at first established merely for the benefit of the king's accountants, and is exercised by the barons only of the exchequer, and not the treasurer, or chancellor. The writ upon which all proceedings here are grounded, is called a *quo minus*; in which the plaintiff suggests that he is the king's farmer, or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able to pay to the king his debt or rent. The surmise of being debtor to the king, is become matter of form, and mere words of course; and the court is open to all the nation equally. And the same holds with regard to the *equity* side of the court: for there any person may file a bill against another, upon a bare suggestion that he is the king's accountant; but whether he is so or not, is never controverted. *Id.* 45.

An appeal from the *equity* side of this court lies immediately to the house of lords; but from the *common law* side, a writ of error must be first brought in the court of exchequer chamber, and from thence a writ of error lies to the house of lords. *Id.* 46.

EXCHEQUER CHAMBER, is a court which was first erected by the statute 31 *Ed.* 3. *c.* 12. to determine causes upon writs of error from the common law side of the court of exchequer. And to that end, it consists of the lord treasurer and lord chancellor, with the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by the statute 27 *El.* *c.* 8. consisting of the justices of the common pleas, and the barons of the exchequer; before whom, writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts, such causes as the judges, upon argument, find to be of great weight and difficulty; before any judgment is given upon them in the court below. From this
court

court a writ of error lies to the house of lords, the last resort for the ultimate decision of every civil action.
3 *Black.* 55.

EXCISE. For the purpose of levying the revenue of excise, the kingdom of *England* and *Wales* (exclusive of the bills of mortality) is divided into forty-nine *collections*; some called by the names of particular counties; others by the names of great towns, where one county is divided into several collections, or where a collection comprehends the contiguous parts of several counties: every collection is subdivided into *districts*, within each of which there is a *super-visor*; and each district is parcelled into *out-rides*, and *foot-walks*, within each of which there is a *gager*, or surveying officer.

And the commissioners and subcommissioners of excise shall constitute, under their hands and seals, such and so many *gagers* as they shall find needful.

In order to which, he who would be made a *gager* must procure a certificate that he is above 21, and under 30 years of age; that he understands the four first rules of arithmetic; that he is of the communion of the church of *England*; how he has been employed, or what business he hath followed; that he is not encumbered with debts; whether single or married; and if married, how many children he has; for if he has above two, he cannot (by the rules of the office) be admitted.

He must also nominate two persons to be his sureties, and it must be certified that they are of sufficient ability; and that the said certificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor where the party applying lives; and at the bottom of the certificate must be his affidavit, that neither he, nor any else to his knowledge, hath directly or indirectly given or promised to give any treat, fee, gratuity, or reward, for his obtaining, or endeavouring to obtain, an order for his being instructed.

When an order for instruction is granted, it is directed to an experienced officer, who receives such person as his pupil; and the like books as officers have, being delivered to such pupil, he goes with and attends the officer who instructs him, and takes surveys, and in his own books makes the like entries as if he was an officer, until the instructor certifies that he is fully instructed.

After

After he is thus certified for, and until he is employed, he is called an *expectant*, being to wait till a vacancy happens.

But no person shall be capable of intermeddling with any office relating to the excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the exchequer, take the oaths of allegiance and supremacy, together with this oath following: *You shall swear, to execute the office of truly and faithfully, without favour or affection, and shall from time to time true account make and deliver to such person or persons as his majesty shall appoint to receive the same; and shall take no fee or reward for the execution of the said office, from any other person than from his majesty, or those whom his majesty shall appoint in that behalf.* And the justices shall certify the taking of such oath, to the next quarter sessions, there to be recorded: and the officer shall also enter a certificate thereof with the auditor of the excise.

And he shall, after his admission, receive the sacrament, and produce a certificate thereof, and take the oaths, and subscribe the declaration against transubstantiation, at the sessions of the peace, as other persons admitted to offices.

The general business of the *supervisor*, is to be continually surveying the houses and places of the persons within his district liable to duties; and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen papers; and every supervisor is in his own book to enter what himself does, each day and part thereof; and also, set down the behaviour, good or bad, the diligence or negligence, of the several officers of his district; and at the end of every six weeks, to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district; and to transmit such diary at the end of every six weeks to the chief office.

And each commissioner takes and peruses a proportion of these diaries, and when he meets with any remarkable complaint against any officer, he communicates it to the rest; who thereupon come to an agreement, either to *admonish, reprimand, reduce, or discharge*. For small faults, officers are admonished; for great ones, reprimanded; for greater, reduced; but for the greatest, they are discharged. The commissioner who peruses the diary, writes in the margin, *admonish, reprimand, or as the case is*.

These

These diaries, after having been thus written upon, are delivered to the clerk of the diaries, who in a book, called the reprimand book, places the admonitions, reprimands, and the like, to each officer's account, and writes every offender word thereof. Which reprimand book is resorted to, upon discovering new faults; and if it is there found, that the officer has before been admonished and reprimanded so often that there are no hopes of his amending, he is then discharged. The said book is likewise resorted to, when application is made for advancing or preferring an officer into a better post. Frequent admonitions or reprimands are a bar to preferment, unless they are of old standing; but if for three years last he stands pretty clear of admonitions and reprimands, those of elder date are not much regarded.

The *collector's* business is, every six weeks to go his rounds; and in the intervals of rounds, he is to be assisting in prosecuting offenders before the justices; he is also to peruse the supervisor's diaries, and where he finds an officer complained of, is to examine him and the supervisor, and having heard both, is in the margin to write his opinion of each fact; he is also to have an eye how the supervisors and officers of his collection perform their duties; and from the vouchers he transcribes into his book the charge on each particular person in his collection.

For faults, gagers are reduced, either to be only assistants, or from foot-walks to out-rides; supervisors are reduced to be again only gagers; and collectors are reduced to be supervisors.

In some instances, discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged, are never again restored, unless one of the discharges appears to have been occasioned by a misrepresentation of the case.

EXCLUSA, a sluice for carrying off water. So *exclusugium* is a payment to the lord for the benefit of such sluice.

EXCOMMUNICATION, is an ecclesiastical censure, whereby the person against whom it is pronounced, is for the time cast out of the communion of the church.

It is of two kinds: the *lesser*, and the *greater*. The *lesser* excommunication is, the depriving the offender of the use of the

the sacraments and divine worship; and this sentence is passed by judges ecclesiastical on such persons as are guilty of obstinacy or disobedience, in not appearing upon a citation, or not submitting to the injunctions of the court. The greater excommunication is, that whereby men are deprived not only of the sacraments and the benefit of the divine offices, but of the society and conversation of all christians.

In the ancient church, the sentences of the greater excommunication were solemnly promulged four times in the year, with candles lighted, bells tolling, the cross, and other solemnities. And by later canons, excommunicate persons shall be publicly denounced in the church every six months; and the churchwardens shall especially take care to keep excommunicate persons out of the church.

The law in many cases inflicts the censure of excommunication *ipso facto* upon offenders; which nevertheless is not intended so as to condemn any person without a lawful trial for his offence; but he must first be found guilty in the proper court, and then the law gives that judgment.

An excommunicate person may make a testament, unless he be excommunicated by the greater excommunication. *Savin. 109.*

But an excommunicate person is disabled to bring an action; and this, whether it be by the greater or lesser excommunication. *1 Inst. 134.*

So also, he cannot serve upon juries, nor can be a witness in any court. And by the rubric in the book of common prayer, the burial office shall not be used for any that die excommunicate.

After a person hath remained forty days under sentence of excommunication, he may, on certificate of the diocesan to the court of chancery, be imprisoned by a writ of *excommunicato capiendo*, until he submits and is absolved; which again being certified by the bishop, another writ, called an *excommunicato deliberando*, issues to the sheriff to discharge him. *2 Inst. 189.*

But if after a person is excommunicate, there comes a general act of pardon, which pardons all contempts, it seems that the offence is taken away without any formal absolution. *2 Bac. Abr. 326.*

EXCOMMUNICATO CAPIENDO, is a writ to the sheriff for apprehending him who stands obstinately excommunicated forty days; for the contempt of such person being

ing certified into the chancery, this writ issues for the imprisoning him without bail until he conforms. *F. N. B.*

EXCOMMUNICATO DELIBERANDO, is a writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the bishop of his conformity to the jurisdiction ecclesiastical. *F. N. B.*

EXECUTION (in civil cases), signifies the obtaining of actual possession of any thing acquired by judgment of law. 1 *Inst.* 154.

If the plaintiff recovers in an action wherein the seisin or possession of **LANDS** is awarded to him, a writ issues to the sheriff commanding him to give possession to the plaintiff of the land so recovered. And this writ is that which is called *habere facias seisinam*, if the land recovered is a freehold; or, if it is a chattel interest, and not a freehold, then the writ is entitled *habere facias possessionem*. In the execution whereof, the sheriff may take with him the power of the county, and may justify breaking open doors, if the possession be not quietly delivered: but if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient. 3 *Black.* 412.

In other actions, where the judgment is, that something in special be done or rendered by the defendant; then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. 3 *Black.* 413.

Executions in actions where **MONEY** is recovered, as a debt or damages, are of five sorts: either against the *body* of the defendant; or against his *goods*; or against his *goods* and the *profits* of his lands; or against his *goods* and the *possession* of his lands; or against all three, his *body*, *lands*, and *goods*. *Id.* 414.

I.

THE first of these species of execution, is by a writ to take the *body* of the defendant, called a *capias ad satisfaciendum*: the intent whereof is, to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages. And this is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is
once

once taken in execution upon this writ, no other process can be sued out against his lands or goods. 3 *Black.* 414, 5.

But if the defendant dies, whilst he is charged in execution upon this writ, the plaintiff may, after his decease, sue out new executions against his lands, goods, or chattels. *Id.* 415.

And this writ may be sued out, as may all other executory process for *costs*, against a plaintiff as well as a defendant, when judgment is had against him. *Id.*

Upon this writ the sheriff may not break open any outer door to execute it, but must enter peaceably, and may then break open any inner door belonging to the defendant, in order to take the goods. *Id.* 417.

When a defendant is once in custody upon this process, he is to be kept in safe and close custody; and if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt: for although upon arrests, and what is called *mesne process*, being such as intervenes between the commencement and end of a suit, the sheriff, before the statute 8 & 9 *W. c.* 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet upon a taking in execution, he could never give any indulgence, for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. *Id.* 415.

Even a rescue of a prisoner in execution, either going to gaol, or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, seeing he may command the power of the county. *Id.* 416.

If the sheriff returns that the defendant cannot be found, the plaintiff may sue out a process against the bail (if any were given); in order to which, a writ of *scire facias* may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages. And if they shew no sufficient cause, or the defendant doth not surrender himself, the plaintiff may have judgment against the bail, and take out a process of execution against them. *Id.*

II.

THE next species of execution is against the *goods and chattels* of the defendant, and is called a writ of *fieri facias*,
com-

commanding the sheriff to *cause to be made* of the goods and chattels of the defendant the sum or debt recovered. In this case the law is the same about breaking open doors in order to come at the goods, as in the former case to come at the person. The sheriff may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he hath raised enough to satisfy the judgment and costs; first paying to the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. If part only of the debt be levied, the plaintiff may have execution against the body for the residue. 3 *Black.* 417.

The old sheriff to whom the writ was delivered, is bound and compellable to proceed in the execution; for the same person that begins an execution shall end it. 1 *Salk.* 323.

If two writs of *feri facias* come to the sheriff in one day, he ought to execute that first which came to hand first; otherwise he makes himself liable, and must answer it to the party that brought the first writ, who may bring an action against him: but the execution nevertheless shall stand good. 1 *Salk.* 320.

If a man recovers jointly against two in an action of debt, the execution ought to be joint against both, and not against one only. 1 *Roll's Abr.* 888.

But if two become bail, and judgment is given against the bail; the execution may be against one of them, without naming the other; for every one of the bail is bound severally. *Id.*

If a man recover damages against a corporation, he shall not have execution of the goods of the particular persons in their natural capacity, but of the goods of the corporation. *Id.* 901.

If, after delivery of the writ, and before execution executed, the defendant becomes bankrupt; that will hinder the execution. 3 *Salk.* 159.

Nothing can be taken in execution that cannot be sold, as deeds and writings; so also, bank notes cannot be taken in execution, for though they are assignable over, yet notwithstanding they remain in some measure *choses in action*, and the sheriff or his bargainee cannot bring an action on them without assignment. *Caf. Hardw.* 53.

The goods of a stranger, in the possession of the defendant, cannot be taken in execution; for the sheriff, at his peril, must take notice whose goods they are: but if the sheriff inquires

inquires by a jury, where the property is lodged, and it is found that they are the defendant's goods, when they are not, this will indemnify the sheriff. *Dalt. Sher.* 60. *Wood. b. 4. c. 4.*

But if the beasts of a stranger be levant and couchant upon the land, they may be taken by the sheriff in execution, for a debt to the king; for they are the issues of the land, and the land is debtor: and if the law were otherwise, a man might defeat the king by agisting the land. *1 Salk.* 395.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good: and if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned *bona fide*, is not liable. For till execution is lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. *Prec. Cha.* 286.

But where a man generally keeps possession of his goods after sale, the sale will be void against others, by the statute of frauds. *Id.*

A seizure of part of the goods in an house, in the name of the whole, is a good seizure of all. *L. Raym.* 724.

If the sheriff sells the goods at an under rate, the sale is good, and the defendant can have no remedy: but where there appears any covin between the sheriff and the purchaser, the owner may have an action against the sheriff. *Kelw.* 64.

Where a *feri facias* is delivered to the sheriff to levy 20*l.*, and he takes an intire thing in execution, as an horse worth 30*l.*, and selleth it for so much, and returns that he levied the 20*l.*; he may retain the other 10*l.* till the defendant demands it, for the sheriff is not bound to seek him. *3 Salk.* 159.

The sale shall take effect, though the judgment shall be afterwards reversed; otherwise none would purchase: but the value of the goods must be restored. *Wood. b. 4. c. 4.*

If part only of the debt be levied, the plaintiff may, on return of the writ, have a writ of execution against the body of the defendant for the residue. *3 Black.* 417.

The execution is not abated by the plaintiff's death; but the sheriff, notwithstanding that, shall proceed in it: for the sheriff hath nothing more to do with the plaintiff, for the writ commands him to levy the money, which the plaintiff's death doth no way hinder. *1 Salk.* 322.

If

If on a *fieri facias* all the money is not levied, the writ must be returned before a second execution can be taken out; for that must be grounded on the first writ; and recite that all the money was not levied upon the first: but if upon the first all the money be levied, the writ need not to be returned, for no farther process is necessary. 1 Salk. 318.

III.

A THIRD species of execution, is by writ of *levari facias*; which affects a man's goods, and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. But little use is now made of this writ; the remedy by the writ of *elegit*, which takes possession of the lands themselves, being much more effectual.

But of this species is a writ of execution proper only to ecclesiastics; which is given, when the sheriff, upon a common writ of execution, returns that the defendant is a clerk beneficed, having no lay fee; in which case, a writ issues to the bishop, to levy the debt of his ecclesiastical goods; who thereupon issues a sequestration of the profits of the benefice, directed to the churchwardens, to gather up the same, and to pay them over to him that had the judgment, till the full sum be raised. 2 Inst. 472.

IV.

A FOURTH species of execution, is by the said writ of *elegit*; which was given by the statute of 13 Ed. 1. c. 18. either upon a judgment for debt or damages, or upon the forfeiture of a recognizance taken in the king's court: by which statute it is enacted, that *when debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth for such debt or damages, to have a writ that the sheriff levy the same of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen, and beasts of his plough, and the one half of his lands, until the debt be levied upon a reasonable price and extent.*

Before this statute, a man could only have satisfaction of goods, chattels, and the present profits of lands, as by the aforesaid writs of *fieri facias*, or *levari facias*, but not the possession of the lands themselves. The statute therefore

granted this writ (called an *elegit*, because it is in the choice or *election* of the plaintiff, whether he will sue out this writ, or one of the former); by which writ of *elegit*, the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen, and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his freehold lands, whether held in his own name, or by any in trust for him, are also to be delivered to the plaintiff to hold, till, out of the rents and profits of the said moiety, the debt be levied, or till the defendant's interest be expired; as, till the death of the defendant, if he be tenant for life, or in tail. The other moiety of the lands was originally reserved, for the lord to distrain for his services. And hence it is, that, to this day, copyhold, and other like customary lands, are not liable to be taken in execution upon a judgment. 3 *Black.* 418, 9.

So, if a copyholder, with licence of the lord, makes a lease for years of the copyhold; the term is not liable to execution for his debt, because the copyhold lands themselves are not liable. 10 *Vin. Abr.* 547.

This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken; but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, then execution may be taken against the body: so that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject, in the course of the common law. 3 *Black.* 418, 9.

It hath been held, that a person may have several *elegits* into several counties, for the intire sum recovered; or that he may divide his execution, and have it for part in one county, and part in another. *M.* 24.

If a man acknowledges a recognizance of 100*l.*, to be paid at five days; presently after the first day, he may sue an *elegit* for 20*l.*, and have the moiety of the land delivered to him; and, when the second day is past, he may have another *elegit* for that 20*l.*, and have the moiety of the remnant delivered to him; and so of the rest; for they are in effect in nature of several judgments in law. 2 *Inst.* 395.

If

If a person hath judgment given against him for debt or damages, or be bound in a recognizance, and dieth, and his heir is within age, no execution shall be sued of the lands during the minority. *Id.*

Upon an *elegit*, the appraisement of goods, and extent of lands, must be by inquest of twelve men, and so returned by the sheriff. *Id.* 396.

And the sheriff ought to deliver one half of all houses, lands, meadows, pastures, rents, reversions, and hereditaments, wherein the defendant had any estate in fee or for life; and if it be so that the defendant be jointenant, or tenant in common, then it ought to be so specially alleged and contained in the return. *Hutt.* 16.

He that recovers land by judgment, shall take it as it is at the time of the execution; that is, if it be sown with grain, and not severed, or grafs growing ready to be cut. *Br. Judgment.*

If there be an execution against tenant for years, without impeachment of waste, though such tenant may cut down and sell, yet the sheriff cannot; because the tenant in such case hath only a bare power without an interest. *1 Salk.* 368.

But where the tenant has an interest as well as a power, as tenant for years hath in standing corn, in such case the sheriff may cut down and sell. *Id.*

During the time that the plaintiff holds the lands so delivered to him, he is called tenant by *elegit*. Yet he hath only a chattel interest therein, and therefore it shall not go to his heir, but to his executor, who is intitled to the debt; for the payment of which, this land is a remedy or security. *2 Black.* 161.

If tenant by *elegit* shall commit waste, he shall, on a writ of account, be compelled to deduct the same out of the sum recovered. *T. L.*

Finally, whenever the defendant hath paid and satisfied the debt, he may enter upon his land. And so it is, when the tenant by *elegit* is satisfied by the ordinary extent or valuation, the tenant of the land may enter. *2 Inst.* 396.

V.

UPON some prosecutions given by statute, as in the case of recognizances or debts acknowledged on statutes merchant and of the staple, the body, lands, and goods, may all

be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an *extent*; because the sheriff is to cause the lands and goods to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. 3 *Black.* 420.

Also the king is intitled by law to sue out execution against the body, lands, and goods, of his accountant or debtor: and his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit. *Id.*

The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting the debt; whereas judgment between subject and subject, shall not bind the land in the hands of a *bona fide* purchaser, but only from the time of actually signing the judgment; nor the goods in the hands of a stranger, or a purchaser, but only from the actual delivery of the writ to the sheriff. *Id.* 420, 1.

A distress for rent, by the landlord, may be seized for the king's debt, before sale. 2 *Vez.* 288.

Lands and goods are to be appraised and extended by inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt; for every extent ought to be by inquisition and verdict of a jury, and without such inquisition the sheriff cannot execute the writ. *Cro. Ja.* 569.

As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered at a reasonable price; and, on a *scire facias* to account, the creditor is to account according to the extended value. *Hardr.* 136.

And when lands are delivered in extent, it is as if the creditor had taken a lease thereof for years, until the debt is satisfied. 1 *Lutw.* 429.

The plaintiff shall be satisfied for all his costs and damages, which, at the time of the *liberate* or delivery of the land to him, he hath sustained. 4 *Co.* 67.

The inquisition ought to be returned by the sheriff; otherwise it is void, and doth not give any title to the plaintiff, although the sheriff delivers to him the land upon it. *Jenk.* 318.

EXECUTION OF CRIMINALS, is the completion of human punishment; and this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff,

or his deputy. In cases of felony, the usage is, for the judge to sign the calendar, or list, of all the prisoners names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name,—“ Let him be hanged by the neck ;” which, formerly, in the days of Latin and abbreviation, was written in a very concise manner, *fus' per coll'*, for *suspendatur per collum*. If, upon judgment to be hanged by the neck till he be dead, the criminal be not thereby killed, but revives, the sheriff must hang him again : for the former hanging was no execution of the sentence ; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. 4 *Black.* 405.

EXECUTOR, is one that is appointed by a person's last will and testament, to have the execution thereof after his decease, and the disposing of all the testator's effects, according to the tenor of the will. He is as much as the *hares designatus* or *testamentarius* in the civil law, as to the debts, goods, and chattels, of the testator. *Terms of the Law.*

All persons are capable of being executors, that are capable of making wills, and many others besides, as femes covert, and infants ; nay, even infants unborn, or in *ventre sa mere*, may be made executors. But no infant can act as such, till the age of seventeen years ; until which time, administration must be granted to some other during his minority. In like manner it may be granted during the absence of the executor out of the kingdom, or when a suit is commenced in the ecclesiastical court touching the validity of the will. 2 *Black.* 503.

This appointment of an executor is essential to the making of a will ; and it may be performed either by express words, or such as strongly imply the same. But if the testator makes his will, without naming any executors, or if he names incapable persons, or if the executors named, refuse to act ; in any of these cases, the ordinary must grant administration with the will annexed, to some other person ; and the duty of the administrator in such cases is very little different from that of an executor. *Id.*

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor ; so that the executor of the executor is to all intents and purposes the executor and representative of the first testator ; but the administrator of the executor is not

the representative of the testator. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of the executor is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all, and his power is only to administer the effects of the intestate executor, and not of the original testator; in which case, therefore, it is necessary for the ordinary to commit administration afresh *de bonis non*; that is, of the goods of the testator not administered by his executor. *Id.* 506.

The office and duty of an executor is,

1. To *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if he be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black.* 508.

2. He must *prove the will* of the deceased; which is done either in common form, which is generally upon his own *oath* before the ordinary or his surrogate; but in the province of *York*, a witness hath been usually also sworn; or in solemn form, by all the witnesses, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof on parchment is made out under the seal of the ordinary, and delivered to the executor, together with a certificate of its having been proved before him; all which together is usually styled the *probate*. *Id.*

3. He must make an *inventory* of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver into the ordinary upon oath, if thereunto lawfully required. *Id.*

4. He is to *collect* all the goods and chattels so inventoried; and, to that end, he has very large powers and interests conferred on him by the law; being the representative of the deceased, and having the same property in his goods, as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. *Id.* 510.

5. He

5. He must pay the *debts* of the deceased; in the payment whereof, he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And first, he must pay all funeral charges, and the expence of proving the will, and the like. Secondly, debts due to the king by matter of record. Thirdly, such debts as are by particular statutes to be preferred to all others; as forfeitures for not burying in woollen, money due on poor rates, and for letters to the post-office. Fourthly, debts of record; as judgments, statutes, and recognizances. Fifthly, debts due by specialty; as for rent, or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts; namely, upon notes unsealed, and verbal promises. *Id.* 511.

Among debts of equal degree, the executor is allowed to pay himself first; by retaining in his hands so much as his debt amounts unto. *Id.*

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts. *Id.* 512.

7. When all the debts and particular legacies were discharged, the *surplus*, or *residuum*, must be paid to the residuary legatee, if any be appointed by the will; and, if there be none, it was long a settled notion, that it devolved to the executor's own use by virtue of his executorship: but whatever ground there might have been formerly for this opinion, it seems now to be understood with this restriction, that although where the executor hath no legacy at all, the residuum shall in general be his own; yet, wherever there is sufficient on the face of the will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin; the executor then standing upon exactly the same footing as an administrator. *Id.* 514.

EXECUTOR DE SON TORT is, where a stranger takes upon him to act as executor, without any just authority; as by intermeddling with the goods of the deceased; in which case he is called executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages. But merely doing acts of necessity or humanity, as locking up the goods, or burying the

corps of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. He is chargeable with the debts of the deceased, so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor, in the same or a superior degree, himself only excepted. And although, as against the rightful executor, he cannot plead such payment, yet it shall be allowed him in mitigation of damages, unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. 2 Black. 507.

EXECUTORY is, where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, or the like. Estates *executed* are, when they pass presently to the person to whom conveyed, without any after act. And an *executory devise* is, where a future interest is devised, that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. If a particular estate is limited, and the inheritance passed out of the donor, this is a *contingent remainder*; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an *executory devise*; and in all cases of executory devises, the estates descend until the contingency happens. So an *executory contract* is, as where two persons agree to exchange horses next week; here the right only vests, and their property in each other's horse is not in possession, but in action. A *contract executed* is, as if they agree to exchange, and do it immediately; in which case the possession and the right are transferred together. A *contract executory* conveys a thing in action; a *contract executed* conveys a thing in possession. 2 Black. 443.

EXHIBIT, is a word in law proceedings; as where a deed or other writing is in a suit in chancery exhibited to be proved by witnesses, and the commissioners certify on the back of it that the deed or writing was shewn to the witness and by him sworn to, this is called an exhibit.

EXIGENT, is a writ requiring the sheriff to cause the defendant to be proclaimed, required, or *exacted*, in five county courts successively, to render himself, and if he does, then

then to take him into custody; but if he does not appear, and is returned *quinto exactus*, that is, five times proclaimed, he shall then be outlawed by the coroners of the county.

EXILE, a banishment, or driving out of a person. This exile is either by restraint, when the government forbids a man, and makes it penal to return; or voluntary, where he leaves his country upon disgust, but may come back at pleasure. *Lit. Dic.* 2 *Lev.* 191.

EXILIUM, is spoken of in our old law books, in reference to tenants or villeins being injuriously driven out, or exiled from their tenements. There was *vastum*, *destructio*, and *exilium*; *vastum* and *destructio* were, when the tenants had their houses, gardens, and woods, wasted or destroyed; *exilium*, when the villein having been manumitted, was afterwards unlawfully driven out of his tenement. 1 *Inst.* 53.

EX OFFICIO, is so called from the power which an officer hath, by virtue of his office, to do certain acts, without being particularly applied to; as a justice of the peace may not only grant surety of the peace at the complaint or request of any person, but he may, in several instances, demand and take it *ex officio*. 1 *Haw.* 137.

The king, by his attorney general, may file informations *ex officio*, in the court of king's bench, which is usually done for such high misdemeanors as peculiarly tend to disturb the government. For offences of this kind, not admitting any delay, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. 4 *Black.* 309.

EX PARTE, of the one part; as a commission in chancery *ex parte*, is that which is taken out and executed by one side or part only, on the other party's neglecting, or refusing to join.

EXPECTANCY, signifies having relation or dependance upon something future. *Estates* are of two sorts, either in *possession*, which are sometimes called estates *executed*; or in *expectancy*, which are *executory*: and of *expectancies*, there are two sorts; one created by the parties, called a *remainder*; the other by act of law, called a *reversion*.

EXPEDITATE,

EXPEDITATE, signifies the cutting out the ball of the fore feet of the dogs of persons living near the forest, to prevent them from running after the king's game; but, within the forest, no dogs were allowed to be kept but mastiffs, (these only being necessary for the keeping a man's house); and they were to be lawed, by cutting off the three claws of the fore foot on the right side, close by the skin.

EX POST FACTO, is a term used in the law, signifying a thing done after something that had been done before. An estate granted may be made good or avoided by matter *ex post facto*, where an election is given to the party to accept, or not accept. 1 Co. 146.

EXTENT, is a writ directed to the sheriff, to seize and value lands and goods to the utmost *extent*, if one that is bound to the king by specialty, or to others by statute or recognizance, hath forfeited his bond or recognizance; so that, by the yearly rent, the creditor may be satisfied. *F. N. B.* 131.

Upon this, the creditor may sue a writ to the sheriff out of the chancery, to deliver him the lands and goods to the value of the debt; which writ is called a *liberate*. Wood. b. 4. c. 4.

Upon an *extent*, the body, lands, and goods, may all be taken at once in execution, to compel the payment of the debt. 3 *Black.* 420.

The king's debt, on an *extent*, shall be preferred to that of every other creditor who hath not obtained judgment before the king commenced his suit. *Id.*

The king's judgment, also, affects all lands, which the king's debtor hath at or after the time of contracting his debt. Whereas, between subject and subject, the judgment shall not bind the lands in the hands of a *bona fide* purchaser, but only from the time of actually signing the same; nor the goods in the hand of a stranger, or a purchaser, but only from the actual delivery of the writ to the sheriff. *Id.*

The lands and goods are to be appraised and extended by inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt; for every *extent* ought to be by inquisition and verdict of a jury; and without such inquisition, the sheriff cannot execute the writ. *Gro. Ja.* 569.

EXTIN-

EXTINGUISHMENT:

1. *Extinguishment, what.*
2. *Extinguishment of rent or service.*
3. *Extinguishment of copyhold.*
4. *Extinguishment of common.*
5. *Extinguishment of a way.*
6. *Extinguishment of a franchise.*
7. *Extinguishment of debt.*

1. *Extinguishment, what.*

EXTINGUISHMENT comes of the verb *extinguere*, to destroy or put out; as when a rent is destroyed or put out, it is said to be extinguished. 1 *Inst.* 147.

2. *Extinguishment of rent or service.*

If a man hath a *rent charge* to him and his heirs, issuing out of certain land, if he purchase any part of this land to him and his heirs, all the rent charge is extinct, because a rent charge cannot by such manner be apportioned; for the rent is intire, and issuing out of every part of the land, and therefore by purchase of part, it is extinct in the whole. But if a man hath a *rent service*, and purchaseth part of the land out of which the rent service is issuing, this shall not extinguish all, but only for the parcel; for a rent service in such case may be apportioned according to the value of the land. 1 *Inst.* 147.

But if one holdeth his land of his lord, by the service to render to his lord yearly at such a feast, a horse, a spear, or the like; if in this case the lord purchase parcel of the land, such service is taken away, because it cannot be severed nor apportioned. *Id.* 148.

If there be lord and tenant by fealty and heriot service, and the lord purchase part of the land, the heriot service is extinct, because it is intire. *Id.* 149.

3. *Extinguishment of copyhold.*

As to the extinguishment of copyhold, it is laid down as a general rule, that any act of the copyholder which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. *Hutt.* 81. *Cro. Eliz.* 21,

As

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. *Moor.* 184. 2 *Co.* 16.

4. *Extinguishment of common.*

By purchasing lands wherein a person hath common appendant, the common is extinguished. *Cro. Eliz.* 594.

If a commoner releaseth his common in one acre, it is an extinguishment of the whole common. *Shew.* 350.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improves part of the waste, leaving sufficient; if he after makes a feoffment to a commoner of the land improved, this will be no extinguishment. *Dyer.* 339. *Hob.* 172.

A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 *Shep. Abr.* 152.

5. *Extinguishment of a way.*

Extinguishment of ways is, as if a man hath a way as appendant, and after purchases the land wherein this way is, the way is extinct. *Terms of the Law.*

6. *Extinguishment of a franchise.*

Extinguishment may be of liberties and franchises; as when the king grants any privileges, liberties, or franchises, which were in his own hands, as parcel of the rights of the crown, as goods of felons and fugitives, waifs, estrays, deodands, and the like; if they come to the crown again, they are drowned and extinct in the crown, and the king is seised of them *jure coronæ*: but if liberties of fairs, markets, or other franchises and jurisdictions, be erected and created by the king, they will not be extinguished, nor their appendances severed from the possessions. 9 *Co.* 25.

7. *Extinguishment of debt.*

If a woman obligee takes the obligor to her husband, it is an extinguishment of the debt, because it would be a vain thing for the husband to pay money to his wife in her own right:

right: but he may pay money to her as executrix, because if she lays the money so paid to her by itself, the administrator *de bonis non* of the testator (if she dies intestate) shall have that money, as well as any other goods that were her testator's. 1 *Salk.* 306.

So if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them, or if the debtee makes the debtor his executor, it is an extinguishment of the debt. 1 *Salk.* 300.

But where a debtee or debtor executor legally refuseth, or he and others being made executors they all refuse, then the debt is revived again. *Plowd.* 185.

Where administration of the goods of the obligee is committed to the obligor, this is only a suspension of the action, and not an extinguishment of the debt; and the reason is, because the commission of administration is not the act of the obligee: for all the interest of an administrator is only from the ordinary; but the interest of an executor is from the testator. 1 *Salk.* 303.

A creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 6 *Co.* 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinguished, and it is become a mere debt at common law. *Yelv.* 38.

So if a bond creditor obtains judgment on the bond, or hath judgment acknowledged to him, he cannot after bring an action on the bond, for the debt is drowned in the judgment, which is a security of an higher nature than the bond. 6 *Co.* 44.

But the accepting a security of an inferior nature is not an extinguishment of the first debt, as if a bond be given in satisfaction of a judgment. *Cro. Ja.* 65c.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee hath a second bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304.

An account stated is no extinguishment of the original debt; and therefore it is no plea in bar to a demand of a debt of the same degree. Nor can a note of hand be pleaded in bar to an action upon simple contract. *Bur. Mansf.* 9.

EXTORTION,

EXTORTION, is an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any person, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes a forfeiture of the office. 4 *Black.* 141.

EXTRAPAROCHIAL, signifies to be out of any parish. Tithes of extraparochial places belong to the king by his prerogative. Extraparochial wastes and marsh lands, when drained and improved, are by the statute 17 *G. 2. c. 37.* to be assessed to all parochial rates in the parish next adjoining.

F A C

FACTOR. A factor is a merchant's agent, residing beyond the seas, or in any remote parts, constituted by letter or power of attorney.

In commissions, it is usual to give the factor power in express words, to dispose of the merchandize, and deal therein as if it were his own; by which the factor's actions will be excused, though they occasion loss to the principal. *Lex Mercat.* 151.

If a factor buys goods on account of his principal, where he is used so to do, the contract of the factor shall oblige the principal to a performance of the bargain; and he is the proper person to be prosecuted on non-performance: but if the factor enters into a charter party of affreightment with a master of a ship, the contract obliges him only, unless he lades aboard generally his principal's goods, when both the principal and lading become liable for the freight, and not the factor. *Goldsb.* 137.

If a factor has not a general, but a limited authority, to purchase at a certain particular price, if he exceeds that, his principal is not bound to accept of that contract. 1 *Ves.* 510.

Goods remitted to a factor ought to be carefully preserved, and he is accountable for all lawful goods which shall come to his hands; yet if the factor buy goods for his principal, and they receive damage after in his possession, through

no neglect of his, the principal shall bear the loss; and if a factor be robbed, he shall be discharged in account against his principal. 4 Co. 83.

Generally, the cargo is liable to pay the freight, or expence of carrying the goods. 2 Atk. 622.

And a factor may detain goods to pay customs in any place, or for salvage. Id. 623.

Also, a factor, to whom a balance is due, hath a lien upon all the goods of his principal, so long as they remain in his possession; but if he parts with the goods, he parts with his lien. Burr. Mansf. 494.

If a man employs a factor to sell goods, who sells them on credit, and before the money is paid dies indebted more than his assets will pay, this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission; for a factor is in nature only of a trustee for his principal. 2 Vern. 638.

FAIRS AND MARKETS:

1. Fairs and markets can only be set up by the king's grants, or by long and immemorial usage and prescription, which presupposes a grant. 1 Black. 274.

And the reason why a fair or market cannot be holden without a grant, is not only for the sake of promoting traffic and commerce, but also for the preservation of order, and prevention of irregular behaviour, where multitudes of people are gathered together. Burr. Mansf. 1817.

2. Fairs are commonly annual, and were granted to be held on the day of the dedication of the church, as many of them are so holden to this day. And they were first held in the churches, afterwards in the church-yard, until restrained by authority. Ken. Par. Ant. 609.

And from this relation to the church, they were commonly kept on *Sundays*; but by 27 Hen. 6. c. 5. it was enacted, that no fair or market shall be kept upon any *Sunday*, except for necessary victual, and on the four harvest *Sundays* (when people on the week days are otherwise fully employed).

3. If I am intitled to hold a fair or market, and another person sets up a fair or market so near mine that it doth me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But in order to make this out to be a nuisance, it is necessary that my market or fair be the elder, otherwise I myself am guilty of the nuisance. Also it is
not

not a nuisance, unless it be within less than seven miles distance from mine. 3 *Black.* 218.

4. *Toll* is not necessarily incident to a fair or market, but the king may grant that toll shall be paid, although it be a charge upon the subject; because the subjects (who in this case are as it were the vendees) have benefit and ease by such fairs or markets: but the king cannot appoint a burdensome toll, but it ought to be only a small sum, to charge the subject. 2 *Inst.* 220.

There is no certain toll limited to be taken; but if that which is taken be not reasonable, it is punishable by the statute of 3 *Ed.* 1. c. 31. and what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them. *Id.* 222.

5. By the 2 *Ed.* 3. c. 15. every lord, at the beginning of his fair, shall there *proclaim* and publish how long the fair shall endure, that merchants may know the time when it expires.

6. Of common right no toll shall be paid for things brought to the fair or market, unless they be sold, and then toll to be taken of the buyer: but in ancient fairs and markets, toll may be paid for the standing in the fair or market, though nothing be sold. 2 *Inst.* 220.

If the king or any of his progenitors have granted to any to be discharged of toll, either generally or specially, this grant is good to discharge him of all tolls to his own fairs or markets, and of the tolls which, together with any fair or market, have been granted after such grant of discharge; but cannot discharge tolls formerly due to subjects, either by grant or prescription; for in every grant of a franchise, priority shall be preferred. 2 *Inst.* 221.

Tenants in ancient demesne, for things coming of those lands, shall pay no toll, because at the beginning by their tenure they applied themselves to the manurance and husbandry of the king's demesnes; and therefore for those lands so holden, and all that came or renewed thereupon, they had the same privilege: but if such a tenant be a common merchant for buying and selling of wares or merchandizes, that rise not upon the manurance or husbandry of those lands, he shall not have the privilege for them, because they are out of the reason of the privilege of ancient demesne. *Id.*

The king shall not pay toll for any of his goods. *Id.*

7. A court

7. A court of the *clerk of the market* is incident to every fair and market, to punish misdemeanors therein; as a court of *pie poudre* is to determine all disputes relating to private or civil property. The object of this jurisdiction is principally the cognizance of weights and measures; and if they be found not according to the standard, besides the punishment of the party by fine, the weights and measures themselves ought to be destroyed. 4 *Black.* 275.

8. The court of *pie poudre*, *curia pedis pulverizati*, is commonly said to be so called from the *dusty feet* of the suitors; or, according to others (which is the more probable derivation), from the old French *pied poldreaux*, a pedlar, being the court of such petty chapmen as resort to fairs or markets. It is the most expeditious court of justice known to this kingdom. 3 *Black.* 32.

It is a court of record, whereof the steward of him who owns or has the toll of the fair or market is the judge. *Id.*

It hath cognizance of all matters of contract that can possibly arise within the precinct of the fair or market; and the plaintiff must make oath that the cause of action arose there. *Id.*

9. Goods in a fair or market cannot be distrained for rent, for they are brought thither for the good of the public: but if they are driving to market, and by the way are put into a pasture, it is otherwise. *Wood. b. 2. c. 2.*

10. The true owner of goods doth not lose his property in them by a sale made by the possessor of them, unless it was in open market. 3 *Atk.* 49.

But, generally, all sales and contracts of any thing vendible, in fairs or open markets, shall be good not only between the parties, but also binding on all those that have any right or property therein. 2 *Black.* 449.

In *London* every day, except *Sunday*, is market day; and every shop, in which goods are exposed publicly to sale, is open market for such things as the owner professeth to trade in. *Id.*

But if my goods are stolen from me, and sold out of open market, my property is not altered, and I may take them wherever I find them. *Id.*

With regard to a *stolen horse*, the sale thereof in a fair or market shall not alter the property, unless the same shall be shewed one hour in the open place of such fair or market, and the sale entered, and the toll paid (where toll is due); otherwise the owner may take his horse again. But if all

these circumstances be complied with, he cannot have his horse again, without paying the price for which the horse was sold in such fair or market. 2 & 3 P. & M. c. 7. 31 Eliz. c. 12.

11. A fair or market may be forfeited by *misuser*; as by keeping them otherwise than they are granted, as keeping a fair on two days when only one is granted, or keeping a market on the *Monday* when it is granted to be kept on *Wednesday*, or for extorting a toll where none is due. But a market shall not be forfeited for *non-user*. *Finch*, 154.

FALSE IMPRISONMENT. By the great charter, no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And, by the petition of right, 3 *Cha.* 1. no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. And by the 16 *Cha.* 1. c. 10. if any person be restrained of his liberty, he may, upon application by his counsel, have a writ of *habeas corpus*, to bring him before the court of king's bench or common pleas, who shall determine, whether the cause of his commitment be just, and thereupon do as to justice doth appertain.

To make imprisonment lawful, it must either be by process from a court of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the cause of commitment. 1 *Black.* 137.

For false imprisonment, the law hath not only decreed a punishment by fine and imprisonment, as a heinous public crime, but hath also given a private reparation to the party by action at law, wherein he shall recover damages for the loss of his time and liberty. 3 *Black.* 127.

FALSE JUDGMENT, is a writ that lies where false judgment is given in the county court, court baron, or other court not of record. It is brought for errors in the proceedings of such inferior courts, or where they proceed not having jurisdiction. *F. N. B.*

FARDEL of land, *ferlingata terra*, is the fourth part of a yardland, which differs in quantity in different places. So we read of *farding deal*, or *quadrantata terra*; so, *obolata*, *solidata*, *librata*, arising (as it seemeth) in proportion of quantity, as a farthing, halfpenny, shilling, and pound.

FARM,

FARM, or *feorme*, is an old Saxon word, and signifies provisions; and it came to be used instead of *rent*, or render, because anciently the greater part of rents were reserved in provisions, as in corn, poultry, and the like, till the use of money became more frequent. So that a *farmer*, *firmarius*, was one who held his lands upon payment of a rent or feorme; though, at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. The usual words in the operation of the lease are, "Have demised, granted, and to farm let." 2 *Black.* 317.

FARRAND-MAN, *Sax.* a person unknown, a stranger.

FAW-GANG; a strolling sort of people, commonly called *gyffies*, whose ancestors were driven out of *Egypt* about the year 1517, and seem to have obtained the appellation of *Faw-gang*, from *John Faw*, one of their principal leaders. See **GYPSES**.

FEALTY. Under the feudal system, every owner of lands held them of some superior or lord, from whom, or from whose ancestors, the tenant had received them; and there was a mutual trust or confidence subsisting between the lord and tenant, that the lord should protect the tenant in the enjoyment of the territory he had granted him; and, on the other hand, that the tenant should be faithful to the lord, and defend him against all his enemies. This obligation, on the part of the tenant, was called his *fidelitas*, or *fealty*; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their lord.

Which oath is in this form: "Know ye this, my lord, "that I will be faithful and true unto you, and faith to you "will bear, for the lands which I claim to hold of you; "and that I will lawfully do to you the customs and services "which I ought to do, at the terms assigned: So help me "God." *Litt.* 91.

This oath is now neglected in many places, but it is undoubtedly yet in force. 1 *Black.* 366. 2 *Black.* 86.

FEES, are certain perquisites allowed to officers who are concerned in the administration of justice, as a recompence for their labour and trouble; and these are either ascertained by act of parliament, or established by ancient usage, which

gives them an equal sanction with an act of parliament.
2 *Bac. Abr.* 463.

Attorneys, before they charge their clients with their fees, must deliver a bill under their hands; and they shall not sue for the fees until after a month from the time of delivering the bill. And the client, on submission to pay the whole sum that on taxation shall appear due, may have the bill taxed by the proper officer; and no suit shall be commenced during the taxation. And if it appear on taxation that the attorney hath been overpaid, he shall refund; if the bill taxed shall be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation; but if it shall not be less, the court may charge the attorney or client at their discretion. 3 *Ja. c. 7.* 2 *G. 2. c. 23.*

The *coroner's* fee for taking an inquisition is 20s. and 9d. for every mile he shall be compelled to travel from home. 25 *G. 2. c. 29.*

Fees to be taken by clerks to the *justices of the peace*, are to be settled by the justices in sessions, and confirmed by the judges of assize; and copies thereof shall be by the clerk of the peace kept constantly in a conspicuous part of the room where the sessions are held. 26 *G. 2. c. 14.*

The fee for the *clerk of assize* or *clerk of the peace* for drawing an indictment of felony is 2s. by the 10 & 11 *W. c. 23.*

No *sheriff*, under-sheriff, or bailiff of liberty, shall take more for serving an extent or execution than 12d. for every pound above 100l. and 6d. for every pound levied under 100l.; on pain of treble damages to the party, and 40l. to the king. 29 *Eliz. c. 4.*

By an ancient statute, the *bailiff's* fee for an arrest is 4d. 23 *H. 6. c. 10.*

Gaolers fees are to be settled from time to time by the justices in sessions; and tables thereof shall be hung up by the clerk of the peace in the court where the sessions are held; and by the gaoler shall be hung up in every gaol. 32 *G. 2. c. 28.*

A gaoler must not disobey a writ of *habeas corpus* for want of his fees; but the court will not turn the prisoner over till the gaoler be paid all his fees. 2 *Harv.* 151.

By statute 14 *G. 3. c. 20.* if a prisoner is acquitted, or discharged upon proclamation for want of prosecution, or hath no bill found against him, he shall pay no fee to the gaoler for his discharge: but such fee as hath been usual, not exceeding 13s. 4d. shall be paid out of the general county rate.

FEE FARM, properly taken, is, when the lord, upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of that farm rent. 2 *Inst.* 44.

It is called a fee farm rent, because a *farm rent* is reserved upon a grant in *fee*. *Id.*

Fee farm rents of the crown, which remained to the king's of *England* from their ancient demesnes, were many of them alienated from the crown in the reign of king *Charles* the second, in pursuance of powers granted by 22 *C. 2. c. 6.* and 22 & 23 *C. 2. c. 24.* And by the annual land tax acts, the receivers of the said rents yet remaining, or which were purchased by virtue of the said acts, shall allow a deduction of so much in the pound as the land tax is laid at for that year; provided that such deduction do not exceed the sum assessed on the whole estate out of which such purchased fee farm rent issues.

FEE SIMPLE. A fee, in general, signifies an estate of inheritance; and when the term is used without any other adjunct, or has the adjunct of *simple* annexed to it, (as, a *fee*, or a *fee simple*,) it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general. 1 *Inst.* 1. 2 *Black.* 106.

FEIGNED ISSUE. A feigned issue is that whereby an action is feigned to be brought, by consent of the parties, to determine some disputed right, without the formality of pleading, and thereby to save much time and expence in the decision of a cause. 3 *Black.* 452.

FELO DE SE, a *felon of himself*, is a person who being of sound mind, and of the age of discretion, voluntarily kills himself; for if a person is insane at the time, it is no crime. But this ought not to be extended so far as the coroners' juries sometimes carry it, who suppose that the very act of self-murder is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all; for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit doth not deprive a man of the capacity of discerning right from wrong; which

is necessary to form a legal excuse. And the law so far discourages this offence, as not to allow the self-murderer christian burial; but he shall be buried ignominiously in the highway, with a stake driven through his body, and his goods and chattels forfeited. 4 *Black.* 189.

FELONY, is supposed by some to come from the Saxon *fell*, which signifies fierce or cruel, of which the verb *fell* signifies to throw down or demolish; and the substantive of that denomination signifies a mountain rough and uncultivated. But the same word, with a little variation, runs through most of the *European* languages, and signifies more generally an offence at large; and the Saxon word *fallan* signifies to offend, and *fallnisse* an offence or failure; and although felony, as it is now become a technical term, signifies in a more restrained sense an offence of an high nature, yet it is not limited to *capital* offences only, but still retains somewhat of this larger acceptation; for petit larceny is felony, although it is not capital.

According to *Sir Henry Spelman*, it signifies such an offence, for which, during the feudal institution, a man should lose or forfeit his estate; which he derives of two northern words, *fee*, which signifies a fief, feud, or beneficiary estate, and *lon*, which signifies price or value. And hence it is perhaps, that to this day felony incurs a forfeiture of estate.

Misprision of felony is the concealing a felony which a man knows, but never consented to; for if he consented, he is either a principal or accessory in the felony. The punishment thereof is fine and imprisonment. If a man will save himself from the crime of misprision, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.* 140.

Compounding of felony, commonly called *theftbote*, is where a man takes his goods again or other amends, not to prosecute. This was anciently punished as felony, but at this day it is only punishable by fine and imprisonment. 1 *Harv.* 125.

By the 3 *Ja. c.* 10. the felon, if able, shall pay the charges of his carrying to gaol; and by the 27 *G. 2. c.* 3. if he is not able, the same shall be paid out of the county rate.

By the 14 *G. 3. c.* 2. a prisoner against whom no bill hath been found, or who shall on trial be acquitted, or be discharged by proclamation for want of prosecution, shall be immediately set at large in court, without paying any fee to the sheriff or gaoler; and such fees as had been usually paid in respect of such discharge, not exceeding 13*s.* 4*d.* shall, on certificate of the judge, be paid out of the county rate.

By

By the 25 G. 2. c. 36. the court, before whom any person hath been convicted of grand or petit larceny or other felony, may, at the prayer of the prosecutor, order his reasonable charges of prosecution to be paid out of the county rate.

And by the aforefaid act of 27 G. 2. c. 3. when any poor person shall appear on recognizance to give evidence, the court may order such sum to be paid to him out of the county rate, as they shall think reasonable, for his time, trouble, and expences.

FEME COVERT, Fr. a married woman; so called from her being under the *cover*, protection, and influence of her husband. So a *feme sole* is a woman single, or unmarried.

FENCE, is a hedge, ditch, or other inclosure of land, for the better improvement thereof. And where a hedge and ditch join together, in whose ground or side the hedge is, to the owner of that land belongs the keeping the same, and the ditch adjoining to it, on the other side, in repair and scoured. *Par. Offic.* 188.

FENCE MONTH, in forests, is the month in which the deer fawn; during which time they are to be *defended* from the interruptions of fear or danger; and therefore it is unlawful to hunt in forests during that time; which begins fifteen days before *Midsummer*, and ends fifteen days after it, being in all thirty days. *Manw.* part 2. ch. 13.

So also, by several acts of parliament, certain rivers are put in *defence* for a limited time, for the protection of the fish during the spawning season.

FEOD, *feud*, *fief*, or *fee*, in the northern languages, signifies a conditional stipend or reward. The constitution of feuds had its original from the northern nations, that in the decline of the *Roman* empire invaded the *Roman* provinces. The conquering generals, in order to secure their acquisitions, allotted large districts or parcels of land to the superior officers, who again dealt out smaller parcels or allotments to the inferior officers and soldiers. And the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given, for which purpose he took the oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the

lands were again to revert to him who granted them. 2 *Black.* 45.

These at first were only estates at will, and then they were called *munera*, or gifts; afterwards they were granted for life, and then they were termed *beneficia*; and for the like reason the livings of clergymen are called *benefices* to this day; and afterwards they were made hereditary, when they were called *feoda*, and in our law *fee simple*. *Rel. Spel.* 9.

FEODARY, *feudatarius*, was an officer of the court of wards, whose business it was to be present with the escheator in every county at the finding of offices of lands, and to give in evidence for the king, as well concerning the value as the tenure. He also received the rents of the lands of the king's wards within his circuit, which he answered to the receiver of the court. This office, together with that court itself, was abolished by the 12 C. 2. c. 24.

FEODUM MILITIS, a knight's estate or fee, was such an estate in value, as required a man to take upon him the order of knighthood; which of old time was estimated at 20*l.* a year.

FEOFFMENT, may be defined to be the gift of any corporeal hereditament to another. He that so gives, or infeoffs, is called the *feoffor*; and the person infeoffed is denominated the *feoffee*. 2 *Black.* 20.

But, by the mere words of the deed, the feoffment is by no means perfected. There remains a very material ceremony to be performed, called *livery of seisin*; without which, the feoffee hath but a mere estate at will. *Id.*

This conveyance by feoffment was anciently the most common and necessary method of conveyance, both because it is solemn and public, and, therefore, best remembered and proved; and also, because it clearth all disseisins, abatements, intrusions, and other wrongful and defeasible estates, where the entry of the feoffor is lawful; which neither fine, recovery, nor bargain and sale by deed indented and inrolled, doth. 1 *Inst.* 9.

But now, since the statute of uses, 27 H. 8. c. 10. the conveyance by lease and release, hath taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it

it the possession without actual entry, and supplying the place of livery of seisin.

FERÆ NATURÆ. Animals *feræ naturæ*, of a wild nature, are those in which a man hath not an absolute, but only a qualified and limited property, which sometimes subsists, and at other times doth not subsist. And this qualified property is obtained either by the art and industry of man, or the impotence of the animals themselves; or by special privilege.

1. A qualified property may subsist in animals, *feræ naturæ*, by the art and industry of man, either by his reclaiming and making them tame, or by so confining them that they cannot escape and use their natural liberty; such as deer in a park, hares or conies in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by the owner, and fish in a private pond, or in trunks. These are no longer the property of a man, than while they continue in his keeping, or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animus revertendi*, which is only to be known by their usual custom of returning.

2. A qualified property may also subsist in these animals, by reason of the impotence of the animals themselves; as when hawks, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones, till such time as they can fly, or run away, and then my property expires.

3. A man may have a qualified property in animals, *feræ naturæ*, by special privilege; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Under which head may be considered, all those animals which come under the denomination of game. Here a man may have a transient property in these animals, so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

2 Black. 391,

FERRY, a liberty by prescription, or the king's grant, to have a boat for passage upon a river, for the carriage of
horses

horses and men for reasonable toll. *T. L.* A ferry is in respect of the landing place, and not of the water; the water may be to one, and the ferry to another. And in every ferry, the land on both sides of the water, ought to belong to the owner of the ferry; otherwise, he cannot land on the other part.

FESTINGMAN, from the Saxon *fest*, to bind; a word not yet out of use. To be free of *festingman*, seems to be discharged from bond services. So *festing penny*, is earnest given to servants on their festing or binding.

FEUD, in *Scotland*, is a combination of kindred, to revenge injuries or affronts done or offered to any of their blood. So *deadly feud*, is a profession of irreconcilable hatred, till a person is revenged even by the death of his adversary.

FIAT (let it be done), is a short warrant, or order of some judge for making out and allowing certain processes, or the like.

FICTION OF LAW is allowed of in several cases; but it must be framed according to the rules of law, and there ought to be equity and possibility in every legal fiction. A common recovery is a fiction of law, a formal act or device by consent, where a man is desirous to cut off an entail. 10 *Co.* 42.

But the law ought not to be satisfied with fictions, where it may be otherwise really satisfied; and fictions in law shall not be carried farther than the reasons which introduced them necessarily require. 1 *Lill. Abr.* 610.

They were invented to avoid inconvenience; and it is a maxim invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. 3 *Black.* 43.

FIELD-ALE, a kind of drinking in the field, claimed by the bailiffs of hundreds from the contribution of the inhabitants.

A FIERI FACIAS is a writ of execution, whereby the sheriff is commanded *quod fieri faciat*; that is, that he cause

to be made, of the goods and chattels of the defendant, the sum or debt recovered against him. 3 *Black.* 417.

And the sheriff having, by virtue of this writ, taken the goods and chattels, may sell the same (even an estate for years, which is a chattel real), until he hath raised enough to satisfy the judgment and costs; first paying the landlord of the premises upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. *Id.*

If part only of the debt be levied, the plaintiff may, on return of the writ, have a writ of execution against the body of the defendant for the residue. *Id.*

FIFTEENTHS were a tribute, or temporary aid, issuing out of personal property, and granted to the king by parliament; it was a real fifteenth part of every man's personal estate, according to a reasonable valuation; for personal estate, in ancient times, was very inconsiderable, and quite a different thing from what it is at present: originally, the amount of the taxation was uncertain, being levied by assessments new made at every fresh grant of the commons. But in the eighth year of *Ed. 3.* it was reduced to a certainty, when a general taxation was made of every township, borough, and city, in the kingdom; which rate was the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* 1 *Black.* 308.

FIGURES are not allowed to express numbers in indictments, but numbers must be expressed in words; 2 *H. H.* 170. *Cr. Cir.* 109. *Andr.* 137. *H.* 11 *G.* 2. *K. & Haddock.* or at least in *Roman* numerals; *Str.* 261. *H.* 6 *G.* *K. & Philips.* By 6 *G.* 2. *c.* 14. it is allowed to express numbers by figures in writings, pleadings, rules, orders, indictments, &c. in courts of justice, as have been commonly used in the said courts, notwithstanding any thing in the 4 *G.* 2. *c.* 26.

FILE, *filum*, a thread, string, or wire, upon which writs and other exhibits in courts and offices are fastened or *filed*, for the more safe keeping, and ready turning to, the same. A file is a record of the court, and the filing of the process of a court makes it a record of it. 1 *Lill.* 112.: so *filacer*, in the court of common pleas, is an officer so called from his filing those writs whereon he makes out process.

FILUM AQUÆ, the thread or middle of the stream, where a river parts two lordships.

FINE OF LANDS.

1. *Fine of lands, what.*
2. *Manner of levying a fine.*
3. *Of the several kinds of fines of lands.*
4. *Effect of a fine levied.*

1. *Fine of lands, what.*

A FINE is sometimes said to be a feoffment of record; though it might, with more accuracy, be called, an acknowledgment of a feoffment on record: by which is to be understood, that it hath, at least, the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof, in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be, an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original, it was founded on an actual suit, commenced at law for the recovery of the possession of land; and the possession thus gained by such composition, was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

2 *Black.* 349.

For, anciently, it was a determination of a real controversy; but now is generally a feigned action, and supposes a controversy, where, in reality, there is none, to secure the title that a man hath in his estate against all men; or to cut off intails, and with more certainty to convey the title of lands to whom he pleaseth, either in fee simple, fee tail, or for life or years. *West. Symb. par.* 2. *f.* 1.

It is called a *fine*, because it puts an end, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. 2 *Black.* 349.

2. *Manner*

2. *Manner of levying a fine.*

The manner of levying a fine by this kind of fictitious proceeding, is as follows:

1. The party, to whom the land is to be conveyed or assured, commenceth an action or suit at law against the other; generally an action of *covenant*, by suing out a writ or *precipe*, called a *writ of covenant*, the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king a *primer*, or first fine, being a noble for every five marks of land, or a tenth part of the yearly value. The suit being thus commenced, there follows,

2. The *licentia concordandi*, or licence to agree the suit; for as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff, who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted; and for it there is another fine due to the king, called the *king's shilver*, and sometimes the *post fine*, with respect to the *primer fine* before mentioned; and it is as much as the primer fine, and half as much more.

3. Next comes the *concord* or agreement itself, after leave obtained from the court; which is usually an acknowledgment from the deforciant (or those who keep the others out of possession), that the lands in question are the right of the complainant: and, from this acknowledgment or recognition of the right, the party levying the fine is called the *cognizor* (or acknowledger), and he to whom it is acknowledged is called the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or before commissioners in the country, by a special authority called a writ of *dedimus potestatem*; which judges and commissioners are bound by the statute 18 Ed. 1. *ff.* 4. to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined, whether she doth it willingly, or by compulsion of her husband; and also, if there be any doubt of her age, she shall be examined as to that. 2 Black. 349. 2 Inst. 515. And by an

an order of the court of common pleas, *H. 17 G. 2.* in fines taken by commissioners, an affidavit on parchment must be made by an attorney of one of the courts of law at *Westminster*, of the great sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and *Durham*, that he knows the cognizors; that the fine was duly signed and acknowledged by them before the two commissioners taking the same; that the cognizors, and two commissioners, were, at the time of taking and acknowledging the said fine, all of full age and competent understanding; that the *femes-covert* (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to and acknowledged the said fine; and that the cognizors, and every of them, knew the same to be a fine to pass his, her, and their estate and estates; and (*H. 26 and 27 G. 2.*) that the said fine was duly signed and acknowledged upon the day and year mentioned in the caption; and that the *razures* or *interlineations* (if any) in the body or caption of such fine, were made before the parties signed the said fine, and before the caption was signed by the commissioners.

By these acts all the essential parts of a fine are completed; and if the cognizor dies after the fine is acknowledged, it may yet be carried on in all its remaining parts; provided that the writ be returned before such death of the cognizor. *2 Black. 351. 2 Wilson, 115.*

4. The next thing is the *note* of the fine; which is only an abstract of the writ of covenant, and of the concord, naming the parties, the parcels of land, and the agreement. This must be inrolled of record in the proper office.

5. The fifth part is the *foot* of the fine, or conclusion of it; which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied.

And thus the fine is completely levied at common law.

But, by several acts of parliament, other solemnities are superadded; particularly, that the fine, after ingrossing, shall be openly read and *proclaimed* in court, once in the term in which it is made, and once in each of the three succeeding; and the chirographer of fines shall cause a table of all the fines levied in each county to be affixed in some open part of the court all the next term; and shall also deliver the contents thereof to the sheriff of every county, who shall, at the next assizes, fix the same in some open place in the court, for the more public notoriety of the fine.

Lands purchased of divers persons by several purchasers, may pass in one fine; and such joint fines are proper to save charges, where the purchases are of small value. 2 *Black.* 351.

But before such fine is allowed to pass, proof must be made that the whole purchase-monies do not exceed 200l.

3. *Of the several kinds of fines of lands.*

FINES thus levied are of four kinds. 1. What is called a fine *sur cognizance de droit come ceo que il ad de son done*; that is, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the best and surest kind of fine, for thereby the deforciant, in order to keep his covenant with the plaintiff of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery; so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges (*cognoscit*) the right to be in the plaintiff or cognizee, as that which he hath *de son done*, of the proper gift of himself the cognizor. 2. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely, not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a reversionary interest which is in the cognizor; for of such reversions there can be no feoffment, or donation with livery, supposed; as the possession, during the particular estate, belongs to a third person. 3. A fine *sur concessit*, or upon grant; which is, where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition; and this may be done, reserving a rent, or the like; for it operates as a new grant. 4. A fine *sur done, grant, et render*; upon gift, grant, and render; which is a double fine, being in a manner two fines, comprehending the fine *sur cognizance de droit come ceo*, &c. and the fine *sur concessit*; and may be used to create particular limitations of estate. In this species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger,

stranger, some other estate in the premises.—But, in general, the first species of fine, *sur cognizance de droit come ceo*, &c. is most used, as it conveys a clear and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine *executed*, whereas the others are but *executory*. 2 *Black.* 352.

4. *Effect of a fine levied.*

The reason why such solemnity is required in passing a fine is, because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons whatsoever, who are of full age, out of prison, of sound memory, and within the four seas, on the day of the fine levied; unless they put in their claim within five years after proclamations made.

So that a fine extends both to *parties*, *privies*, and *strangers*; and the *parties* and *privies* are foreclosed by it presently, and the *strangers in futuro*. 2 *Inst.* 516.

The *parties* are either the cognizors or cognizees; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed as this is almost the only act that a feme-covert (or married woman) is permitted by law to do (and that, because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual, and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate. 2 *Black.* 355.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation: such as are the heirs-general of the cognizor, the issue in tail, the vendee, the devisee, and all others who must make title by the persons who levied the fine. *Ibid.*

Strangers to a fine are all other persons in the world, except only parties and privies; whose right is bound unless they make claim within five years after proclamations made; except femes-covert (not being parties to the fine), infants, prisoners, persons beyond the seas, and such as are not of sound mind; who have five years allowed to them and their heirs, after such impediment removed. Persons also that have

have not a present, but a future interest only, as those in remainder or reversion, have five years allowed to claim in, from the time that such right accrues. And if within that time they neglect to claim, or (by the statute 4 *An. c. 16.*) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. *Ibid.*

And the courts of law will not suffer a fine to be impeached (when once levied) on account of any defect of understanding, or even lunacy or idiotcy, of the cognizor. 12 *Co.* 124. 2 *Co.* 58. 10 *Co.* 42.

But in order to make a fine of any avail, it is necessary that the parties have some *interest* in the lands to be affected by it; otherwise two strangers, by confederacy, might defraud the owners, by levying fines of their lands.

Thus tenant *for years, at will, or at sufferance*, cannot by fine divest an estate, and turn it to a right. 2 *Atk.* 240. 2 *Vez.* 482.

If a fine be levied by *tenant for life*, it immediately operates as a forfeiture of the estate of the tenant for life, and the remainder-man or reversioner may enter presently; but he is not bound so to do, for the law gives him five years after the death of the tenant for life; because it is not presumed that he will look after the determination of the estate, sooner than in the natural way. 2 *Vez.* 482.

If a man levy a fine of my land while I am in *possession* of it, this fine will not hurt me; for he that has the estate or interest in him cannot be put to his action, entry, or claim; because he has that already, which the action, entry, or claim, would give him. *Wood. b. 2. c. 3.*

But if I have a fee-simple, and am *disseised*, and the disseisor doth levy a fine with proclamations, and I do not claim within five years after, I and my heirs are barred for ever. *Ibid.*

But a wrong doer, in order to gain a possession by disseisin, must not only step on the land, and then leave the rightful owner in possession; which, though sufficient to give him a seisin on a feoffment, is not sufficient to levy a fine. 3 *Atk.* 339.

But evidence of receipt of rent is a sufficient possession to levy a fine. *Ibid.*

A *trustee* cannot levy a fine to defeat the *cestuy que trust*; for every one in possession, with notice of the trust, is a

trustee; and *cestuy que trust* hath nothing to do with the possession. 2 *Verz.* 476. 2 *Atk.* 240.

A fine levied by the *mortgagor* or *mortgagee*, will not bar the equity of redemption. *Hard.* 512. 2 *Vern.* 190.

So fine by the mortgagor to a second mortgagee, will not bar the first mortgagee, though more than five years pass; the mortgagor continuing in possession, and paying the interest, being only tenant at will to the first mortgagee. *Carth.* 414. (13 *Vin.* 282.)

A fine *sur cognizance de droit come ceo*, &c. without any consideration expressed, or uses declared, whether the cognizor be in possession, or the fine be of a reversion, shall enure to the old use, in whomsoever it was at the time of levying the fine; and, although it passes nothing, yet, after five years and non-claim, it will operate as a bar. 2 *Wilf.* 19.

And if a consideration appears, yet as it conveys an absolute estate, without any limitations, to the cognizee, this assurance could not be made to answer the purposes of family settlements (wherein a variety of uses is often expedient), unless its force were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. And if such deed is made previous to the fine, it is called a deed to *lead* the uses of the fine; if made subsequent to the fine, it is called a deed to *declare* the uses. 2 *Black.* 363.

FINE FOR ALIENATION, was an attendant of tenure by knight's service, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection, it not being reasonable that a feudatory should transfer his lord's gift to another, without the consent of the lord, lest an enemy to the lord should be introduced into the tenure. And if the tenant aliened without licence, it was, in strictness, a forfeiture of the lands: but this severity was mitigated by the statute 1 *Ed.* 3. c. 12. which ordained, that, in such case, the lands should not be forfeited, but a reasonable fine be paid to the king: upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but if the tenant presumed to alien without licence, a full year's value should be paid. 2 *Black.* 71.

But, by 12 *C.* 2. c. 24. all fines for alienation, and other incidents of tenure by knight's service, are taken away; except

kept fines for alienation due by particular customs of particular manors.

Which customary fines are, in some places, arbitrary at the will of the lord; in other places, limited and certain. But, even where they are arbitrary, the courts of law, in favour of the tenant, have tied them down to be reasonable in their extent; and therefore no fine is allowed to be taken, either upon alienations or descents (unless in particular circumstances), of more than two years' improved value of the estate. 2 *Black.* 98.

FINE FOR OFFENCES. By the bill of rights, 1 *W.* 3. c. 2. excessive fines ought not to be imposed; and all grants and promises of fines and forfeitures of particular persons, before conviction, are declared to be illegal and void.

The reasonableness of fines in criminal cases hath been usually regulated by the determination of *magna charta*, c. 14. concerning amercements for misbehaviour in matters of civil right, which is as follows: *A freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault, after the greatness thereof; saving to him his contenement; and a merchant likewise, saving to him his merchandise; and a villein, saving his wainage.* Which intends, generally, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the landholder, his contenement or land; to the trader, his merchandize; and to the countryman, his wainage, or team and instruments of husbandry. In order to ascertain which, the same *magna charta* directs, that the amercement shall be set, or reduced to a certainty, by a jury. This method of liquidating the amercement to a precise sum, is usually done in the court-leet and court-baron by assesseurs, or jurors sworn to assere, tax, and moderate, the general amercement, according to the particular circumstances of the offence and the offender. In imitation of which, in courts superior to these, the ancient practice was, to inquire by a jury what a man was worth by the year, saving the maintenance of himself, his wife, and children. And since the disuse of such inquest, it is not usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that (when a man is not able to pay) amounts to imprisonment for life. 4 *Black.* 379.

B b 2

FIRE.

FIRE. See BURNING.

FIREBOTE, a privilege of tenants to take wood for fuel.
See ESTOVERS.

FIRE ORDEAL. See ORDEAL.

FIRMA ALBA, a white farm, or rent, paid in silver, and not in cattle or provisions for the lord's house.

FIRST FRUITS was the value of every spiritual living by the year, which the pope, claiming the disposition of all ecclesiastical livings within Christendom, reserved out of every living. 12 Co. 45.

These, together with the tenths (which were the tenth part of such livings paid annually), the pope claimed as due to himself by divine right; and this portion or tribute was, by ordinance, yielded to the pope in the 20 Ed. 1.; and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know, and be answered of, that yearly revenue; so as the ecclesiastical livings chargeable with the tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament: and to render the payment of these to the pope more easy, the popes sometimes granted the same to our kings for certain terms. 2 Inst. 627, 8.

At the reformation these were taken from the pope, and annexed to the crown; and a valuation was then made of all the ecclesiastical livings, in the 26 Hen. 8.; according to which valuation, the first-fruits and tenths still continue to be paid.

Vicarages, according to the said valuation (which is recorded in what are now called the king's books), not exceeding 10l. a year, and parsonages not exceeding ten marks, are discharged of first-fruits. 1 El. c. 4. s. 29.

And all ecclesiastical benefices with cure of souls, not exceeding 30l. a year according to the improved value, are discharged of both first-fruits and tenths. 5 An. c. 24. s. 1.

By the 2 & 3 An. c. 11. these revenues are appropriated to the augmentation of small livings, and from thence have received the name of *queen's bounty*.

FISHERY. A *free* fishery, or exclusive right of fishing in a public river, is a royal franchise, held by grant or prescription.

scription. It differs from a *several* fishery, because he that has a *several* fishery must also be the owner of the soil, which, in a *free* fishery, is not requisite. It differs also from a *common* of fishery, in that the *free* fishery is an exclusive right, the *common* of fishery is not so; and therefore in a *free* fishery a man hath a property in the fish before they are caught; in a *common* of fishery, not till afterwards. 2 *Black.* 39.

Fishery, in navigable rivers, or arms of the sea, is common and public; it *prima facie* belongs to the crown, and the presumption is against any exclusive right; yet an exclusive right may be prescribed for; but the proof lies on the claimer of it. In private rivers, not navigable, it belongs to the lords on each side. *Bur. Mansf.* 2164.

FISHPOND. Any man may erect a fishpond without licence, because it is a matter of profit, and for the increase of victuals. 2 *Inst.* 199.

Stealing fish out of inclosed private fishponds, streams, or other waters, is transportation for seven years; and attempting to steal them is 5*l.* penalty. 5 *G.* 3. c. 14.

If any person, armed and disguised, shall steal any fish out of any river or pond; or (whether armed and disguised or not) shall break down the head or mound of any fishpond, whereby the fish shall be lost or destroyed; he shall be guilty of felony without benefit of clergy. 9 *G.* c. 22.

FLEDWITE, or *flightwite*, a freedom or discharge from amercements, forfeited by a person having *fled* for an offence.

FLEMENFRITH (from *frid*, peace) seems to be an amercement for harbouring an offender, having broken the king's peace, and fled for the same.

FLIGHT, is evading the course of justice, by a man's voluntarily withdrawing himself. On an accusation of treason, or felony, or even petit-larceny, if the jury find that the party fled for the same, he shall forfeit his goods and chattels, although he be acquitted of the offence; for the very flight itself is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But now the jury very seldom find the flight; such forfeiture being looked upon, since the vast increase of personal property, as

too large a penalty for an offence, to which a man is prompted by the natural love of liberty. 4 *Black.* 387.

FLORIN, a foreign coin, in *Spain* 4s. 4d. in *Germany* 3s. 4d. in *Holland* 2s.

FLOTSAM, is where a ship is sunk, or cast away, and the goods *float* upon the surface of the water.

FOCAGE (from *focus*, a hearth), the privilege of getting fuel: the same as *firebote*.

FOLK-LAND was such as was held by no assurance in writing, but distributed among the common *folk*, or people, at the pleasure of the lord, and resumed at his discretion; and was no other than villenage. It was so called in contradistinction to *book-land*, which was held by deed or writing, in which the tenant had a freehold of inheritance.

FOLK-MOTE (from *folk*, and *gemot*, an assembly), was a common council of the inhabitants of a city, town, or borough, convened at the *moot* hall or house. It seems to have been used for any kind of public meeting.

FOOTGELD, an amercement for not expediting, or cutting out the balls of the feet of dogs in the forest. To be free from *footgeld*, is a privilege to keep dogs within the forest unexpedited, without punishment.

FORCIBLE ENTRY AND DETAINER, are the violent taking, and keeping possession of lands and tenements, with threats, force, and arms, and without the authority of law. This was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it hath been thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; the entry forbidden by law, is such as is supported and maintained with force, violence, and unusual weapons. By the statute 5 *R. 2.* *§.* 1. *c.* 8. all forcible entries are punished with imprisonment and ransom at the king's

king's will. And by the several statutes, 15 R. 2. c. 2. 8 H. 6. c. 9. 31 El. c. 11. and 21 Ja. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands or benefices of the church, a justice of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view; and, upon such conviction, may commit the offender to gaol till he makes fine and ransom to the king. And, moreover, the justice shall have power to summon a jury, to try the forcible entry or detainer complained of; and, if the same be found by that jury, then, besides the fine on the offender, the justice shall make restitution, by the sheriff, of the possession, without inquiry into the merits of the title; for the force is the thing to be tried, punished, and remedied, by them; and the same may be done at the general sessions. But this doth not extend to those who have had peaceable possession for three years next before. 4 Black. 148.

FORCIBLE MARRIAGE. By 3 H. 7. c. 2. if any person shall take away any woman, having lands or goods, or that is heir-apparent to her ancestor, by force and against her will, and afterwards she be married to him, or to another by his procurement, or defiled; he, and also the procurers and receivers of such woman, shall be adjudged principal felons. And, by 39 El. c. 9. the benefit of clergy is taken away from the principals, procurers, and accessaries before.

And, by 4 & 5 P. & M. c. 8. if any person shall take or convey away any unmarried woman under the age of sixteen (though not attended with force), he shall be imprisoned two years, or fined, at the discretion of the court; and if he deflowers her, or contracts matrimony with her without the consent of her parent or guardian, he shall be imprisoned five years, or fined, in like manner. And, by 26 G. 2. c. 33. the marriage of any person under the age of 21, by licence, without such consent, is void.

FORECLOSURE of equity of redemption is, where the mortgagee, in order to prevent the mortgagor from redeeming the estate, or to recover his money lent upon the security thereof, applies to a court of equity to compel the mortgagor either to sell the estate, or to redeem it by payment of the money presently; or, in default thereof, to be for ever de-

barred from redeeming the same, which is called the *foreclosure of the equity of redemption*.

FOREIGN, *forinsecus*, signifies of another country; and, in our law, is diversified in several respects.

Foreign attachment, is an attachment of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty.

Foreign kingdom, is a kingdom under the dominion of a foreign prince; so that *Ireland*, or any other place subject to the crown of *England*, cannot with us be called foreign, though to some purposes they are distinct from the realm of *England*. As if two of the king's subjects fight in a foreign kingdom, and one of them is killed, it cannot be tried here by the common law, but it may be tried by the constable and marshal according to the civil law; or the fact may be examined by the privy council, and tried by commissioners appointed by the king in any county in *England*. 3 *Inft.* 48.

Foreign plea, is a plea in objection to a judge, where he is refused as incompetent to try the matter in question, because it arises out of his jurisdiction. *Kitch.* 75. And if a plea of issuable matter is alledged in a different county from that wherein the party is indicted or appealed, such pleas can only be tried by juries returned from the counties wherein they are alledged. 2 *Haw.* 404.

Foreign service, is that whereby a mesne lord holds of another, without the limits of his own fee; or that which the tenant performs, either to his own lord or to the lord paramount, out of the fee. *Kitch.* 299. Also the payment of extraordinary aid, as opposed to *intrinsic service*, which was the common and ordinary duty within the lord's court.

Counterfeiting foreign coin, current in *England* by the king's proclamation, or bringing any such counterfeit foreign coin into *England*, with intent to utter the same in payment, is high treason. 1 *Mar. st.* 2. c. 6. 1 & 2 *P. & Mar.* c. 11. And counterfeiting foreign coin not current in this kingdom, is misprison of treason. 13 *El.* c. 2.

If any of the king's subjects shall *inlist* into any foreign service, he shall be guilty of felony without benefit of clergy. 9 *G. 2.* c. 30. 29 *G. 2.* c. 17.

A person contracting with, or endeavouring to persuade, any artificer to go into any foreign service, shall forfeit 500l. and be imprisoned for 12 months; for the second offence shall forfeit 1000l. and be imprisoned two years. And an artificer

artificer going out of the kingdom to teach any manufacture to foreigners, shall be incapable of a legacy, or of being executor or administrator, and of taking any lands by descent, devise, or purchase, and shall forfeit his lands and goods, and be deemed out of the king's protection. 3 G.c. 27. 23 G. 2. c. 13.

FOREIGN *bill of exchange*, is a bill drawn by a merchant residing abroad, upon his correspondent in *England*; or drawn by a merchant in *England*, on his correspondent abroad. 2 Black. 457.

If a stranger of *Holland*, or any foreign country, buys goods at *London*, and gives a note under his hand for payment, and then goes away privately into *Holland*, the seller may have a certificate from the lord mayor, on proof of sale and delivery of the goods; upon which, the people of *Holland* will execute a legal process on the party. Also, at the instance of an ambassador or consul, such a person of *England*, or any criminal against the laws here, may be sent from a foreign kingdom hither. Where a bond is given, or contract made, in a foreign kingdom, it may be tried in the king's bench, and laid to be done in any place in *England*. Hob. 11. 2 Bulstr. 322.

FOREIGNERS, though made denizens, or naturalized here, are disabled to bear offices in the government, to be of the privy council, or members of parliament. 12 W. c. 2.

FORESTS, are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary, which are under the king's protection, for the sake of his royal recreation and delight; and to that end, and for preservation of the king's game, there are particular laws, privileges, courts, and officers, belonging to the king's forests. 1 Black. 279.

The forest courts are, the court of *attachments*, of *regard*, of *swainmote*, and of *justice-seat*. 1. The court of *attachments*, is to be held before the verderers of the forest, once in every forty days, to inquire of all offenders against the king's deer, or covert for the same, who may be *attached* by their bodies, if found in the very act of transgression, otherwise by their goods; and, in this court, the foresters are to bring in their attachments or presentments of vert and venison; and the verderers are to receive the same, and to inroll them, and to certify them, under their seals, to the court of *justice-seat* or *swainmote*; for this court can only inquire of, but not convict, offenders. 2. The court of *regard*, or survey

survey of dogs, is to be holden every third year, for the lawing or expeditating of mastiffs; which is done by cutting off the claws of the fore feet, to prevent them from running after deer. No other dogs but mastiffs were permitted to be kept within the king's forests, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house. 3. The court of *swainmote*, is to be holden before the verderers as judges, by the steward of the swainmote, thrice in every year, the tvecins or freeholders within the forest composing the jury. The jurisdiction of this court is, to inquire into the oppressions and grievances committed by the officers of the forest, and to receive and try presentments certified from the court of attachments against the offenders in vert and venison. And this court may not only inquire, but convict also; which conviction shall be certified to the court of *justice-seat*, under the seals of the jury; for this court cannot proceed to judgment. But the principal court is, 4. The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis iudiciarius in itinere*, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever, therein arising. It may also proceed to try presentments made in the inferior courts of the forest, and to give judgment upon the convictions that have been made in the swainmote courts. It may be held every third year. This court may fine and imprison, it being a court of record. And a writ of error lies to the court of king's bench. 1 *Black.* 289. 2 *Black.* 38. 3 *Black.* 71.

But the forest laws have long ago ceased to be put in execution. 1 *Black.* 289.

A forest, in the hands of a subject, is, properly, the same with a chase, being subject to the common law, and not to the forest laws. 2 *Black.* 38.

Beasts of forest are, properly, hart, hind, buck, hare, boar, and wolf; but, legally, all wild beasts of venary or hunting. 1 *Inst.* 233.

FORESTALLING (*forestallan*, or *forestallan*), in the English Saxon, signifies, properly, to market before the public, or to prevent the public market; and, metaphorically, to intercept in general; and seemeth derived from *fore* (which is the same as *before*), and *stall*, a standing-place or department; from whence sprang the ancient word *stallage*, which signifies

money paid for erecting a stall or stand, for the selling of goods in a fair or market. This offence of forestalling was described by the statute 5 & 6 Ed. 6. c. 14. to be buying or contracting for any merchandize, or victual, coming in the way to market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; and was punishable by the said statute, according to the degrees of the offence. Which statute being now repealed, by the 12 G. 3. c. 71. the same remains an offence at common law, punishable upon indictment by fine and imprisonment.

FORESTER, is a sworn officer ministerial of the forest, to watch over the vert and venison, and to make attachments and true presentments of all manner of trespasses done within the forest.

FORFANG (from *fang*, to take) was the *taking* of provision in a fair or market, *before* the king's purveyors had been served for his majesty's use. A grant to be freed from *forfang*, was an immunity from amercement or forfeiture for the said offence.

FORFEITURE (*forisfactura*, *forfait*, Fr.), is the consequence of attainder for treason, felony, or misprision thereof: and it is of two kinds; either of *lands* or *goods*.

By the common law, all *lands* of inheritance, whereof the offender was seised in his own right, are forfeited to the king by an attainder of high treason; and to the lord of whom they are immediately holden, by an attainder of petty treason or felony. But the lord cannot enter into such lands, without a special grant, until it appear by due process, that the king hath had his prerogative of the year, day, and waste: concerning which, it is enacted by 17 Ed. 2. c. 16. that the land shall be forthwith taken into the king's hands, and he shall have all the profits thereof for a year and a day; and the land shall be wasted and destroyed in the houses, woods, and gardens, and in all manner of things belonging to the same land; and after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee, unless he fine before with the king for the year, day, and waste. 2 Harv. 451.

As to forfeiture of *goods*, all things whatsoever, which are comprehended under the notion of personal estate, which
the

the party hath or is intitled to in his own right, are liable to forfeiture, upon a conviction of treason or felony, or upon an acquittal of a capital felony or petty larceny; or of petty larceny if the party is found to have fled for it. But the jury very seldom find the flight; forfeiture being looked upon since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty. 2 *Haw.* 451. 4 *Black.* 387.

Although the forfeiture upon an attainder of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the *land*, yet it shall relate to the time of the conviction or flight found only, as to *chattels*; and therefore the offender may *bona fide* sell any of his chattels, for the sustenance of himself and family, between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer would be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. 4 *Black.* 387.

FORGERY, is an offence at *common law*, and an offence also by *statute*. Forgery at the *common law* is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, and the like. As for writings of an inferior nature, such as private letters to friends, the counterfeiting of them is not properly forgery; therefore in some cases it may be more safe to prosecute such offenders for a misdemeanor as cheats. The punishment on an indictment of forgery at common law, may be by pillory, fine, and imprisonment. But indictments for this offence are now seldom brought at common law, but on some of the statutes which generally inflict a more severe punishment. 1 *Haw.* 184.

The *statutes* which make forgery an offence are numerous. The first is that famous one of 5 *El. c.* 14. whereby the forging or making, or knowingly publishing or giving in evidence, any forged deed, charter, or writing sealed, or any court roll, or will, is punishable by forfeiture of double costs and damages to the party grieved, standing upon the pillory, having both his ears cut off, his nostrils slit and seared,

feared, forfeiture to the king of the profits of his lands during life, and imprisonment during life: and for any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any *personal* chattels, the same forfeiture is given to the party grieved, and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment; and, in both cases, the second offence is made felony without benefit of clergy.

Another general statute is 2 G. 2. c. 25. whereby the first offence is made felony without benefit of clergy, in the case of forging or procuring to be forged, or uttering as true, any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof, or any acquittance or receipt for money or goods, with intent to defraud any person.

And by many other particular statutes, forgeries of divers kinds are made felony without benefit of clergy. As the forging of bank bills or notes, dividend warrants, exchequer bills, power to transfer stocks, lottery tickets, policy of assurance, army debentures, stamps whereby to defraud the revenue, and many other of the like kind.

FORISFAMILIATED, is where a man ceases to become part of his father's family, becoming himself the head of another family.

FORM, is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or entrap. *Hob.* 232. The formal part of the law, or method of proceeding, cannot be altered but by parliament; for if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. *1 Black.* 142.

FORMA PAUPERIS, is where any person is so poor, that he cannot bear the usual charges of suing at law or in equity. In this case, upon his making oath that he is not worth 5 l. and bringing a certificate from a counsellor at law, that he believeth him to have cause of suit, he shall, by the 11 H. 7. c. 12. have original writs and subpoenas gratis, and counsel and attorney assigned him without fee: and by 23 H. 8. c. 15. he shall, when plaintiff, be excused from costs, but shall suffer other punishment at the discretion

discretion of the judge. And it was formerly usual to give such paupers, if nonsuited, their election, either to be whipped, or pay the costs; though the practice is now disused; and *Holt* chief justice said, he had no officer for it, and he never knew it done. 3 *Black.* 400. 2 *Salk.* 506.

And it seems agreed, that a pauper may recover costs, though he pay none; for although the counsel and clerks are bound to give their labour to him, yet they are not bound to give it to his antagonist. 3 *Black.* 400.

On an *indictment*, the defendant may be admitted to defend in *forma pauperis*; for though it is not within the statute of *Hen.* 7. which relates to civil suits only, yet it may be reasonable to do it on indictments at common law, where the prosecutor (who can have no costs) is not prejudiced. *Str.* 1041.

And by the several stamp acts, persons admitted to sue or defend in *forma pauperis* shall not be liable to the duties on stamped paper or parchment.

FORMEDON upon an alienation by tenant in tail, whereby the estate tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of (*formedon secundum formam doni*), because the writ doth comprehend the form of the gift; which is in the nature of a writ of right, and is the highest action that tenant in tail can have. For he cannot have an absolute writ of right, which is confined only to such as claim in fee simple; and for that reason this writ of *formedon* was granted him by the statute of 13 *Ed.* 1. c. 1. called the statute *de donis*.

This writ is distinguished into three species; a *formedon* in the *descender*, in the *remainder*, and in the *reverter*.

A writ of *formedon in the descender* lieth, where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon in the descender* to recover these lands so given in tail, against him who is then the actual tenant of the freehold.

A *formedon in the remainder* lieth, where one giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him

him the remainder, and keeps him out of possession; in this case, the remainder man shall have his writ of *formedon in the remainder*.

A *formedon in the reverter* lieth, where there is a gift in tail, and afterwards by the death of the tenant in tail without issue of his body the reversion falls in upon the donor, his heirs, or assigns; in such case the reversioner shall have this writ to recover the lands. 3 *Black.* 191.

But these writs are now seldom brought, except in some special cases, where it cannot be avoided; and the trial of titles by *ejectment* is now the usual method, which is done with much less trouble and expence.

FORNICATION, is the act of incontinency in single persons; for if either party is married, it is adultery; the spiritual court hath the proper cognizance of this offence: but formerly, the courts leet had power to inquire of and punish fornication and adultery; in which courts the king had a fine assessed on the offenders, as appears by the book of Domesday. 2 *Inst.* 488.

FORPRISE, *taken beforehand*; is a word frequently used in leases and conveyances, implying an exception or reservation.

FORTIORI, *a fortiori*, or *multo fortiori*, is an argument often used by *Littleton*, to this purpose; if it be so in a feoffment passing a new right, *much more* is it for the restitution of an antient right. *Co. Litt.* 253. 260.

FORTLICE, a fortified place.

FORTUNE-TELLING. If any person shall pretend to exercise any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, he shall be imprisoned for a year, and be set on the pillory once in every quarter of that year, and further bound to the good behaviour as the court shall award. 9 *G. 2. c.* 5.

FORTY-DAYS COURT. The court of *attachement* or *wood-mote*, held before the verderers of the forest once in every forty days, to inquire concerning all offenders against vert or venison. 3 *Black.* 71.

FOSSA,

FOSSA, a ditch full of water, wherein women committing felony were drowned: it has been likewise in antient writings used for a grave. *Jacob. Dict.*

FOSSATURA, a work done by tenants in *digging* ditches or trenches.

FOSSEWAY, was antiently one of the four principal highways in *England*, leading through the kingdom, supposed to be dug and made by the *Romans*, and having a ditch on one side. *Cowel.*

FOURCHER, (Fr.) signifies a putting off or delaying of an action; which is chiefly when an action is brought against two, who, being jointly concerned, are not to answer till both appear; and they agree not to appear both in one day; whereupon the appearance of the one excusing the default of the other, he has day over to appear with the other, and at that day the other appears, but he that appeared before doth not, to have another day by the adjournment of the party who then appeared.

By stat. of *West.* 1. c. 42. coparceners, jointenants, &c: may not *furch*, by *essoign*, to essoign severally; but shall have only one essoign, as one sole tenant: and 23 *H.* 6. c. 2. the defendants shall be put to answer without *furching*. 2 *Inst.* 250.

FRACTION. The law allows of no fraction of a day; as if a thing is to be done on such a day, the law allows all that day to do it in. If an offence be committed, as in case of murder, the year and day shall be computed from the beginning of the day on which the wound was given, and not from the precise minute or hour. 2 *Haw.* 163.

FRANCHISE, or liberty, is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. 2 *Black.* 37.

Being therefore derived from the crown, it must arise from the king's grant; or, in some cases, may be held by prescription, which presupposes a grant. *Ibid.*

The same identical franchise, that hath before been granted to one, cannot be granted to another; for that would

would prejudice the former grant, and the priority of grants is to be regarded. *Id.*

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts. Other franchises are, to hold a court leet: to have a manor or lordship, or at least a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal-fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas (which is still a greater right), so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty, exempt from the sheriff of the county, wherein the grantee only, and his officers, are to execute all process: to have a fair or market, with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like: to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty. *Id.*

All franchises or liberties, being derived from the crown, are therefore extinguished if they come to the crown again by escheat, forfeiture, or otherwise.

Forfeiture may accrue either by *misuser*, or *non-user*.

1. By *misuser*; as by keeping a fair or market otherwise than it is granted; as keeping it on two days, when one only is granted; or keeping it upon a *Monday*, when it is granted to be kept on a *Wednesday*; or for extorting fees, and such like. 2. By *non-user*; for if one hath liberties, and doth not use them within memory, they are lost. But non-user of a market is no forfeiture. 9 Co. 50.

When a man claims or uses a franchise or liberty which he ought not to have, it is said to be an *usurpation* upon the king; and a writ of *quo warranto*, or a writ in the nature of a *quo warranto*, may be brought for that, as well as upon a misuser or non-user.

FRANKALMOIGN, free-alm, is a tenure, whereby a religious corporation, aggregate or sole, holdeth lands of the donor, to them and their successors for ever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor, his ancestors, and successors; and there-

fore they did no fealty (which is incident to all other services but this) because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day; the nature of the service being upon the reformation altered, and made conformable to the doctrine of the church of *England*.

So great regard was there shewn to religion, and religious men, in ancient times, that the tenants in frankalmoign were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions. And even at present, this is a tenure of a nature very distinct from all others, being not at all feudal, but merely spiritual; for, if the service be neglected, the law gives no remedy, by distress, or otherwise, to the lord of whom the lands are holden, but merely a complaint to the ordinary or visitor to correct it: wherein it materially differed from what was called tenure by *divine service*, in which the tenants were obliged to do some special divine services in certain, as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *frankalmoign*, or *free-alms*. 2 *Black.* 101.

FRANKING LETTERS. The privilege of letters coming free of postage to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made; but afterwards dropped, upon a private assurance from the crown, that this privilege should be allowed the members; and, accordingly, a warrant was constantly issued to the post-master-general, directing the allowance thereof, to the extent of two ounces in weight, till at length it was expressly confirmed by statute 4 *G. 3. c. 24.* with many new regulations.

And by 24 *G. 3. c. 37. f. 7.* no letters or packets shall be exempted from postage, except such, not exceeding two ounces weight, as shall be sent during the sitting of parliament, or within 40 days before or after any summons or prorogation, and whereon the whole superscription shall be of the hand-writing of the member directing the same; and shall have his name indorsed thereon, together with the name of

of the post-town from which the same is intended to be sent; and the day, month, and year, when put into the office (the day of the month to be in words at length); and the same shall be put into the office on the day of the date thereof.

And no letter to any member of either house of parliament shall be exempted, unless directed to such member at the place where he shall actually be at the time of the delivery thereof, or at his usual place of residence in *London*, or at the house of parliament, or the lobby of such house of which he is a member.

Also the said statute of 4 G. 3. c. 24. exempts from postage, printed votes or proceedings in parliament, or printed newspapers, sent without covers, or in covers open at the sides, signed on the outside by any member of parliament, or directed to a member at any place whereof he shall have given notice to the post-master-general.

Also clerks in the public offices may continue to frank votes and newspapers as heretofore, provided they be sent without covers, or in covers open at the sides.

FRANK-MARRIAGE, *liberum maritagium*, is where tenements are given by one man to another, together with a wife who is daughter or kinswoman of the donor, to hold in *frank-marriage*. By which gift, though nothing but the word *frank-marriage* is expressed, the donees shall have the tenements, to them and the heirs of their two bodies begotten; that is, they are tenants in special tail. It is called *frank* or *free* marriage, because the donees are liable to no service but fealty. But this is now intirely out of use. 2 *Black.* 115.

FRANKPLEDGE, was anciently a certain number of *freemen*, who became *pledges* or sureties for each other's good behaviour. In order whereunto, by the laws of king Alfred, it was ordained, that all freemen should cast themselves into several companies, by ten in each company, and that every of those ten men of the company should be surety and pledge for the forthcoming of his fellows; so that if any harm were done by any of those ten against the peace, the rest of the ten should be amerced, if he of their company that did the harm should fly, and were not forthcoming to answer to that wherewith he should be charged. And every of those companies, consisting of ten men, with their families, was

therefore called a *tithing*, and were to meet together once a year, and be viewed, and examined how the peace had been kept; which meeting was called the *view of frankpledge*, and is now no other than what is called the *leet* court. And as ten times ten do make an hundred, so it was ordained that ten of those companies, or pledges, should meet together for their matters of greater weight; therefore that general assembly was, and yet is, called the *hundred* court. *Lamb. Conslab.*

FRAUD:

1. *Of fraud in general.*
2. *Of fraudulent alienations to defeat creditors or purchasers.*
3. *Concerning the statute of frauds and perjuries.*

1. *Of fraud in general.*

COVIN and fraud, in many cases (saith lord Coke), to do a wrong, doth choke a mere right; and the ill manner doth make a good matter unlawful. 1 *Inst.* 357.

Where a man takes an unreasonable advantage against a necessitous heir, by drawing him into an agreement for a small sum at present, for a large sum to be paid on the death of his ancestor, a court of equity will relieve. 2 *Atk.* 135.

But if a person will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud, or some undue means made use of to draw him into such agreement. 2 *Atk.* 251.

But if a bargain be such as no man in his senses would make, a court of law will set it aside. As in the case of *Jones and Morgan* (1 *Lev.* 111.), an action was brought upon a promise to pay for a horse, one barley corn for the first nail, and double every nail further; and averred, that there were 32 nails in the shoes of the horse, which doubling every nail, came to 500 quarters of barley. At the trial at *Hereford* assises, the judge (*Hide*) directed the jury to give no more than the real value of the horse in damages, being 8 *l.*, and so they did. 1 *Wils.* 295.

Where an unconscionable bargain is made with an infant before he comes of age, and a note of hand is taken from him immediately on his coming of age, equity will order it to be cancelled. 2 *Atk.* 25.

A con-

A consideration of some sort or other, is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it: as if one promises to give another 100*l.*, in this case nothing is contracted for or given on the one side, and therefore there is nothing binding on the other. 2 *Black.* 445.

But as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore doth not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration, in order to evade the payment; and courts of justice will support these, as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract. *Ibid.*

And, generally, a voluntary conveyance is held fraudulent against a subsequent purchaser for a valuable consideration. 3 *Atk.* 412.

A young man gave a note to a girl in this form, "Then borrowed and received of *A. B.* the sum of 20*l.*, which I promise never to pay:" It was held by the lord chief justice *Parker*, on the northern circuit, that an action for this money did well lie, upon the lending on one side, and borrowing on the other, notwithstanding the words in the conclusion. 2 *Atk.* 32.

2. *Fraudulent alienations to defeat creditors or purchasers.*

By the 13 *El. c. 5.* "All conveyances of lands or goods, to defraud creditors and others of their just debts, damages, forfeitures, heriots, or mortuaries, shall be void as to them: Provided, that this shall not extend to purchasers *bona fide*, upon good consideration, not having notice of the fraud at the time of the conveyance."

And by the 27 *El. c. 4.* "All conveyances of lands to defraud purchasers shall be void; but with a proviso as before, that this shall not extend to purchasers on good consideration and *bona fide*. And if lands be conveyed with condition of revocation or alteration, and afterwards sold for good consideration, the former conveyance shall, with respect to the first vendees, be void."

No deed shall be deemed to be made *bona fide*, which is accompanied with any *trust*; as if a man makes a gift of his goods to one of his creditors in satisfaction of his debt, but in trust that the donee shall favour him, or permit him or some other to possess them, and to pay the debt when he is able, this is not *bona fide*. 3 Co. 81.

If a man conveys his estate to the use of himself for life, with power to mortgage such part as he shall think fit, remainder to trustees to sell and pay all his debts, but continues in possession and keeps the deed, and afterwards becomes indebted by bond, judgment, and simple contract; this deed is fraudulent as against creditors by bond and judgment, who, having no notice of the settlement, shall not come in on average only with the simple contract creditors. 2 Vern. 510.

Every *voluntary* conveyance is not fraudulent, but *prima facie* it is presumed to be so against purchasers, unless the contrary be made appear. Cha. Ca. 100.

But if a man makes a voluntary conveyance in consideration of natural affection, and is not at that time indebted to any, nor in treaty with any for the sale of the lands, such conveyance hath no badge of fraud: but otherwise it is, if he be indebted, or in treaty for the sale of the lands; and there is scarcely an instance, where the person conveying was indebted at the time, that the conveyance hath not been deemed fraudulent against creditors. 1 Atk. 15. 2 Vez. 11.

And where there is a voluntary conveyance made, and afterwards a subsequent conveyance for valuable consideration, though there be no fraud in that voluntary conveyance, nor the person making it at all indebted, yet such mere voluntary conveyance is void at law, by the subsequent purchase for valuable consideration. 2 Vez. 10.

By the 3 H. 7. c. 4. all deeds of gift of goods and chattels made of trust, to the use of the person that made the deed, shall be void.

If a man that is a debtor, makes a deed of gift of all his goods, to prevent the taking of them in *execution* for his debts, it is void as against creditors; but against himself, his own executors or administrators, or any man to whom he shall after convey them, it is good. Bacon's Use of the Law, 62.

But although a man fears an execution against his goods, yet he may sell them outright for money, at any time before the execution served; provided there be no reservation of trust,

trust, as that on paying the money he shall have the goods again, for that trust proves a fraud to prevent the execution. *Id.*

But after the writ of execution is delivered to the sheriff, such sale shall not bind the property.

If a man is *indicted*, and gives away his goods to prevent a forfeiture, the king shall have them upon an attainder or conviction; otherwise, if he sells them to one for a valuable consideration who had no notice of the indictment.

3 *Salk.* 174.

Marks or badges of fraud in a gift or grant of goods are, if it be general of *all* his goods without exception of some things of necessity; if the donor still possesses and uses the goods; if the deed be made secretly; if it be a trust between the parties; or if it be made pending the action. And therefore lord *Coke* advises, when a gift is made in satisfaction of a debt, by one who is indebted to others also, that it be made, 1. In a public manner, before neighbours, and not in private. 2. That the goods be appraised by honest people to the full value, and the gift made in satisfaction of the debt. 3. That immediately after the gift, the donee take possession of them; for the continuance of the possession is a sign of a trust. 3 *Co.* 80.

Courts of equity, and courts of law, have a concurrent jurisdiction to suppress and relieve against fraud. What circumstances and facts amount to fraud, is properly a question of law. But the interposition of equity is often necessary for the investigating truth, and to give more complete redress. *Bur. Mansf.* 396.

3. Concerning the statute of frauds and perjuries.

By the 29 C. 2. c. 3. " All leases, estates, interests of freehold, or terms of years, or any uncertain interest out of lands, made by livery of seisin only or by parol, and not put in writing, and signed by the parties or their agents authorized in writing, shall have the effect of leases or estates at will only, any consideration for making such parol lease or estate notwithstanding. *f.* 1. Except all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord shall amount to two thirds at least of the full improved value of the thing demised." *f.* 2.

" And no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being

" copyhold or customary interest, shall be granted or surrendered, unless it be by deed, or note in writing, signed by the party or his agent in writing, or by act and operation of law." *f. 3.*

" And no action shall be brought, (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or (3) to charge any person upon any agreement made upon consideration of marriage; or (4) upon any contract or sale of lands, or any interest therein; or (5) upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some person by him lawfully authorized." *f. 4.*

" And all devises of lands shall be in writing, and signed by the devisor, and attested and subscribed in his presence, by three or four credible witnesses." *f. 5.*

" And all declarations or creations of trusts of lands shall be in writing, signed by the party who is by law enabled to declare such trust, or by his last will; except such trusts as shall arise or result, or be transferred or extinguished by act or operation of law. And all assignments of trusts shall also be in writing, signed by the party, or by his last will." *f. 7, 8, 9.*

" And judgments, as against purchasers, shall be binding only from the time of signing the same, and not by referring back to the first day of the term." *f. 13, 14, 15.*

" And writs of execution shall bind the property of goods only from the time of delivering the writ to the sheriff; who shall, for the better manifestation of such time, indorse the day and year when he received it." *f. 16.*

" And no contract for sale of goods for ten pounds or upwards, shall be good, except the buyer shall receive part of the goods, or give something in earnest to bind the bargain, or in part of payment, or some note or memorandum in writing be signed by the parties or their agents lawfully authorized." *f. 17.*

All leases, &c. On a parol agreement for a lease for a term of years, the lessee entered and enjoyed for some time; and on a bill brought against him to execute a counterpart, he pleaded the statute of frauds; but not allowed, because

cause the agreement was in part carried into execution. *Str.* 783.

Except all leases not exceeding the term of three years. So that a verbal lease will hold for three years, and in this respect hath the advantage of a written lease; for a written lease for three years, or any other term, unless it be upon stamped paper or parchment, will only have the effect of an estate at will; that is, for one year: for by the several stamp acts, such written lease shall not be given in evidence in any court, until it shall have been stamped, and the stamp duty hath been paid, and also an additional sum of 10*l.* if the lease hath been written upon paper or parchment before it was stamped.

To answer for the debt of another person. If a man promise to a surgeon, that, if he cure such a one of a wound, he will see him paid; this is only a promise to pay, if the other does not: but if he promise to pay the surgeon what he shall deserve for doing it, this is binding upon him without writing. *L. Raym.* 224.

And the distinction is this: where an action will lie against the party himself, there an undertaking by another for performance is within the statute, and is not good unless it be in writing; as if a man say, send goods to such a one, and if he doth not pay you I will: otherwise it is, where an action doth not lie against the party himself; as if a man say, send goods to such a one, and I will pay you. *L. Raym.* 1085, 6.

Upon any agreement made upon consideration of marriage. It is not necessary that a promise to marry another be in writing; for the statute extends only to consideration of marriage. *Str.* 34.

Upon any contract or sale of lands. A letter setting forth that the party had agreed to sell an estate, is not sufficient to take it out of the statute, unless the letter set forth what the agreement was. *Str.* 426.

Trust resulting by operation of law. A trust by operation or construction of law is, where an estate is purchased in the name of one person, and the money is paid by another, this is a resulting trust for him who paid the money; or where a trust is declared only as to part, and nothing is said as to the rest, what remains undisposed of results to the heir at law. 2 *Atk.* 71. 150.

No contract for the sale of goods. If a man bespeak goods, and after they are made, refuses to take them, this is not within

within the statute, though no note was given for the money, nor any earnest paid; for the statute only relates to actual contracts for the sale of goods, where the buyer is immediately answerable, and the seller is to deliver the goods immediately. *Str.* 506.

FRAXINETUM, a woody ground, where ashes grow.

FREE BENCH, (a free seat,) *frank banc*, is the widow's share of her husband's copyhold or customary lands (in the nature of dower), which is variable according to the customs in particular places. In some manors it is one third, sometimes half, sometimes the whole, during her widowhood, of all the copyhold or customary land which her husband died possessed of. In some places by custom she holds them only during her *chaste* viduity. In the manors of *East and West Enbourne*, in the county of *Berks*, and the manor of *Torre*, in *Devon*, and other parts of the *West of England*, there is a custom, that, when a copyhold tenant dies, his widow shall have her free bench in all the customary lands, while she continues sole and chaste; but if she commits incontinency, she forfeits her estate: yet, nevertheless, on her coming into the court of the manor, riding backwards on a black ram, with his tail in her hand, and saying the words following, the steward is bound by the custom to re-admit her to her free bench. The words are these:

Here I am,
Riding upon a black ram,
Like a whore as I am;
And for my crincum crancum
Have lost my bincum bancum,
And for my tail's game,
Have done this worldly shame:
Therefore, I pray, Mr. Steward, let me have my lands
again.——*Cowel.*

It is a kind of penance among jocular tenures and customs, by way of atoning for the offence committed. 2 *Black.* 122.

FREE CHAPEL, is so called from its being free or exempt from the jurisdiction of the ordinary. Most of the free chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and his retinue when he came to reside there. And when the crown parted with those estates, the chapels

went along with them, and retained their first freedom. But some lords having had free chapels in manors that do not appear to have been ancient demefne of the crown, such are thought to have been built and privileged by grants from the crown. *Tanner's Not. Monast. Pref.* These chapels are visitable by the king, and not by the ordinary; which office of visitation is executed for the king by the lord chancellor.

A FREEHOLD may be in *deed* or in *law*: a freehold in *deed* is actual seisin of lands or tenements in fee simple, fee tail, or for life. A freehold in *law*, is a right to such lands or tenements before entry or seisin. So there is a *seisin* in *deed*, and a *seisin* in *law*: a seisin in *deed* is, when a corporal possession is taken; a seisin in *law* is, where lands descend before entry, or when something is done which amounts in law to an actual seisin. 1 *Inst.* 31. 266.

Tenant in fee simple, fee tail, or for life, is said to have a freehold, so called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. 1 *Inst.* 43.

A freehold cannot be conveyed to pass in *futuro*, for then there would be want of a tenant against whom to bring a *precipe*; and, therefore, notwithstanding such conveyance, the freehold continues in the vendor: but if livery of seisin is afterwards given, the freehold from thence passeth to the vendee. 2 *Wils.* 165.

A man is said to be *seised* of freehold, but to be *possessed* of other estates, as of copyhold lands, leases for years, or goods and chattels.

FREIGHT, Fr. *fret*, signifies the money paid for carriage of goods by sea; or, in a larger sense, it is taken for the cargo or burthen of the ship. Ships are freighted either by the ton, or by the great; and, in respect of time, the freight is agreed for at so much *per month*, or at a certain sum for the whole voyage. If a ship freighted by the great, is cast away, the freight is lost; but if a merchant agrees by the ton, or so much for every piece of commodities, and the ship is cast away, if part of the goods is saved, it is said she ought to be answered her freight *pro rata*: and when a ship is *insured*, and such a misfortune happens, the insured commonly transfer their goods over to the assurers towards a satisfaction of what they make good. *Merchants Compan.* 79.

FRESH

FRESH FORCE, *frisca fortia*, is a force newly done in any city, borough, or the like: and if a person be disseised of any lands or tenements within such city or borough, he who hath right to the land, by the usage and custom of such city or borough, may bring his assise or bill of *fresh force*, within forty days after the force committed, and recover the lands. *F. N. B.* But this is now out of use, the possession being usually recovered by ejectment.

FRESH SUIT, or pursuit, is the immediate and uninterrupted following an offender, as of a robber in case of robbery, of a prisoner in case of prison breaking, or of goods escaped or driven off the premises in case of a distress. The benefit of the pursuit of a felon is, that the party pursuing may have his goods restored to him, which otherwise are forfeited to the king. But if the thief be not apprehended immediately, but it is some time before he is apprehended, yet if the party did what in him lay to take the offender, and notwithstanding that in such case he happened to be apprehended by some other person, it shall be adjudged fresh pursuit. This is in the discretion of the court, though it ought to be found by the jury; and the judges may, if they think fit, award restitution without making any inquiry concerning the same. Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is fresh suit, to excuse the gaoler. And if a lord follow his distress into another's ground, on its being driven off the premises, this is called fresh suit. So where a tenant pursues his cattle that escape or stray into another man's ground. And fresh suit may be either within the view or without. 2 *Haw.* 169.

FRIENDLESS MAN, was the old Saxon appellation for him whom we call an *outlaw*; and the reason of his being called so was, because, being out of the king's protection, he was after a certain number of days denied all help of friends: hence there was a mulct or fine called *friendwite* for a man harbouring an outlaw.

FRIER, *frater*, a brother of some religious society.

FRITH, Sax. *peace*. So *frithbrech*, breach of the peace. *Frithgild*, or *frithmote*, the court or place of assembly of the freemen,

freedmen, the moot-hall. *Frithman*, the herdsman who takes care of the stint in the pasture, or to keep the pasture freed at certain seasons of the year.

FRUIT. By 37 *H. 8. c. 6. f. 4.* every person who shall bark any fruit tree, shall forfeit to the party grieved, treble damages, by action at the common law; and also 10*l.* to the king. And by 43 *El. c. 7. f. 1.* every person who shall rob any orchard or garden, or dig or pull up any fruit trees, with intent to take the same away (the same not being felony by the laws of this realm), shall, on conviction, before one justice, give to the party such satisfaction for damages as such justice shall appoint; and, in default of payment, to be whipped. And with respect to what shall be deemed *felony by the laws of this realm*, the distinction seems to be, that if they be any way annexed to the freehold, as trees growing, or apples growing upon the trees, then the taking and carrying them away is not felony, but trespass only, for a man cannot steal a part of the freehold; but if they be severed from the freehold, as wood cut, or apples gathered from the trees, then the taking of them is not a trespass only, but felony.

FUGACIA, a chase.

FUMAGE, is mentioned in Domesday, and is that which is vulgarly called *smoke farthings*, which were paid by custom to the king for every smoke or chimney in the house. It is sometimes used to denote *wood for fuel*, as in an old grant—*Et sint quieti de fumagio et meremio cariendo* (to be free from the carrying of wood either for fuel or timber).

FUNERAL expences are allowed previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black. 508.*

But in strictness, no funeral expences are allowable against a creditor, except for the shroud, coffin, ringing the bell, parson, clerk, grave-digger, and bearers' fees. 1 *Salk. 196.* And in general it is said that no more than forty shillings in the whole, for funeral expences, shall be allowed against creditors. 3 *Atk. 249.*

FURCA,

FURCA, the gallows. In ancient grants to lords of manors and others, there was often the privilege of *furca et fossa*; that is, of trying and punishing felons, the men by hanging, and the women by drowning. 3 *Inst.* 58. So there was *furca et flagellum*, which was the meanest of all servile tenures; where the bondman was at the disposal of his lord for life and limb.

FURLONG, is a quantity of ground in length, eight of which furlongs make a mile. It is otherwise the eighth part of an acre of land. *Ja. Dist.*

FURNAGE (from *furnus*, an oven), is a sum paid to the lord by the tenants who are bound by their tenure to bake at the lord's oven, for their liberty to bake elsewhere. Also the word is used to signify the gain or profit taken for baking.

G A I

GAINAGE (*wainagium*), the plough and furniture for carrying on the work of tillage. It was applied only to arable land, when they had it in occupation, and had nothing from it for their sustenance but what they raised by their own labour, nor any other title but at the lord's will. And *gainer* is used by *Bracton* for a *sokeman* that hath such land in occupation. The word *gain* is mentioned by *West*, where he says, "land in demesne, but not in gain." And in the statute 51 *Hen.* 3. there are these words, "no man shall be distrained by the beasts that gain his land." By the *magna charta*, c. 14. *gainage* signifies no more than the plough-tackle or implements of husbandry, without any respect to gain or profit; where it is said of the knight and freeholder, he shall be amerced *salvo contenemento suo*, the merchant or trader *salva merchandiza sua*, and the villein or countryman *salvo wainagio suo*. In which cases it was, that the merchant or husbandman should not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his wainage, that the plough should not stand still. For which reason the husbandman at this day is allowed a like privilege by law, that his beasts of the plough are in many cases not liable to distress.

GALLI-

GALLIGASKINS, wide hose or breeches, having their name from their use by the *Gascoigns*.

GALLIHALFPENCE, a coin brought into this kingdom by the *Genoese* merchants, who trading hither in *galleys*, lived commonly in a lane near *Tower-street*, and were called *galley-men*, landing their goods at *Galley-key*, and trading with their own silver coin called *galley-halfpence*. *Stowe's Survey of London*, 137.

GALLIMAWFRY, a meal of coarse victuals, given to *galley-slaves*.

GALOCES, a kind of shoe, worn by the *Gauls* in dirty weather; mentioned in the statute 14 & 15 H. 8. c. 9.

GAME. It is a maxim of the common law, that such goods of which no one can claim any property do belong to the king by his prerogative; and hence all those animals *fera nature*, which come under the denomination of game, are styled in our laws, his *majesty's* game; and that which he hath, he may grant to another; and, consequently, another may prescribe to have the same, within such a precinct or lordship. And hence comes the right of the lords of manors or others, by grant or prescription, unto the game within their respective liberties. 2 *Bac. Abr.* 613.

By the statute of 22 & 23 C. 2. c. 25. every person, not having an estate of inheritance of 100 *l.* a year, or leasehold for 99 years or upwards of 150 *l.* a year (other than the son and heir apparent of an esquire or other person of higher degree, and the owners and keepers of forests, parks, chafes, or warrens), is declared to be a person not allowed, by the laws of this realm, to have or keep any guns, bows, dogs, snares, nets, or other engines, for the taking and killing of game.

The preservation of the game is provided for by a great variety of acts of parliament, upwards of forty in number.

And duties have lately been imposed on certificates to be issued to persons who shall use any dog, gun, net, or other engine for the taking or destroying of game; and to gamekeepers; for which see *Burn's Just.* title *Game*.

GAMEKEEPER. All lords of manors or other royalties, not under the degree of an esquire, may appoint a gamekeeper within their respective manors, with power therein to kill game. But there shall be only one gamekeeper, with such power, within any one manor; and his name shall be entered

tered with the clerk of the peace where such manor lies. And he shall also be a servant of such lord, or immediately employed by him to kill game for the sole use of the lord, and not otherwise; that is, unless qualified in his own right to kill game.

GAMING is said not to be an offence at common law, but only an offence prohibited by statute: but gaming houses are held to be nuisances, as drawing together a number of idle and disorderly people. 1 *Haw.* 198.

To restrain this practice of gaming, many statutes have been enacted. By 33 *H. 8. c. 9.* no person shall keep any common house or place of bowling, coytng, cloysh, cayls, half bowl, tennis, dicing-table, or carding, or any unlawful game, on pain of 40*s.* a day; and every person resorting thither, and playing, shall forfeit 6*s.* 8*d.* And artificers, husbandmen, servants, and the like inferior persons, are prohibited to play at any such like games out of *Christmas*; or in *Christmas*, except only in their masters' houses.

By 16 *C. 2. c. 7.* if any person shall lose above 100*l.* at one time or sitting, and shall not pay the same at that time, he shall not be obliged to make it good; and the winner shall forfeit treble value, half to the king and half to him that shall sue.

By 9 *An. c. 14.* if any person shall at one time or sitting lose to the value of 10*l.* and pay down the same, he may recover the same back again with costs, on suit within three months; and if he shall not sue in that time, any person may sue for and recover the same and treble value. And all securities given for money won by playing shall be void. And if any person shall by *fraud*, or other ill practice, win any sum, he shall forfeit five times the value, and be deemed infamous, and suffer corporal punishment as in case of perjury. And if any person shall *assault*, or challenge to fight, any other person, on account of money won by gaming, he shall forfeit all his goods and chattels, and be imprisoned for two years.

And by several statutes in the reign of *Geo. 2.* all private lotteries, by tickets, cards, or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly poly, and all other games with dice, except backgammon), are prohibited under the penalty of 200*l.* for him that shall erect such lottery; and 50*l.* a time for any that shall play.

GANG DAYS, days for perambulation of the boundaries of parishes; from the Saxon *gangan*, to go.

GAOL

GAOL AND GAOLER :

1. The keeping of gaols is incident to the office of sheriff, and therefore he hath the appointment of the gaoler, for whose acts or omissions the sheriff, in many cases, is answerable; and therefore it behoves him to put in such a person as is sufficient.

2. For the sustentation of prisoners in the gaol, the justices of the peace in sessions shall settle an allowance, which shall be paid out of the general county rate. 14 *Eliz. c. 5.*

3. By 24 *G. 2. c. 40.* no licence shall be granted for retailing spirituous liquors in any gaol, nor shall any spirituous liquors be brought into or used therein. And by the 24 *G. 3. c. 54.* no gaoler, or person in trust for him, shall be capable of being licensed to sell any wine, ale, or other liquors, or have any beneficial interest or concern whatsoever in the sale or disposal of any liquors of any kind; or in any tap-house, tap-room, or tap, on the penalty of 10*l.*

4. Debtors and felons shall not be kept or lodged in one room. 22 *C. 2. c. 20.*

5. For preservation of the health of prisoners, the walls and cielings both of the cells and wards shall be scraped and white-washed once a year at least, and the gaol shall constantly be kept clean, and supplied with fresh air by hand ventilators, or otherwise. 14 *G. 3. c. 59.*

6. If the gaoler *voluntarily* suffer a prisoner to escape, if it is for a criminal matter, he shall be punished in the same manner as the prisoner ought to have been who escaped, and the sheriff also may be punished by fine and imprisonment; if the gaoler *negligently* suffers him to escape, the court may charge either the sheriff or gaoler. If the gaoler suffers an escape in a *civil* case, the sheriff or gaoler, at the election of the party, shall answer damages for it to the party injured. 2 *Harv. 135.*

7. If the gaoler suffers a debtor, though confined only upon mesne process, to go at large, although the prisoner returns the same day, yet the gaoler is liable to an action upon the case for damages; for after the gaoler hath permitted the escape, he cannot detain him again for the same matter; and if it were otherwise, every gaoler would suffer his prisoner to go at large, as much as if he had never been arrested. 2 *Wilson. 294.*

GAOL DELIVERY. By the law of the land, that men might not be long detained in prison, but might receive full
Vol. I. D d and

and speedy justice, commissions of gaol-delivery are issued out, directed to two of the judges, and the clerk of assize associate; by virtue of which commission they have power to try every prisoner in the gaol, committed for any offence whatsoever. By divers ancient statutes no man was to act as judge in the county where he was born or inhabited; but by the 12 G. 2. c. 27. he may act in the commission of gaol delivery, and of *oyer and terminer* in any county in *England*; but he is still restrained in civil causes of *assize* and *nisi prius*. 4 *Black.* 269.

GARBA, (Fr. *garbe*,) signifies a sheaf or bundle of corn, faggots, or the like. Thus *decima garbarum*, is the tithe of the sheaves of corn, or other grain. *Garba sagittarum*, is a sheaf of arrows, containing in number twenty four. *Garb*, in *heraldry*, is a sheaf of wheat.

GARCIO, Fr. *garçon*, a groom or servant.

GARNISHMENT, a warning; as *garnisher le court* is to warn the court, and *reasonable garnishment* is where a person hath reasonable warning.

GARNITURE, is a furnishing or providing: as garniture of arms or implements of war, is a providing of them for the defence of a town or castle.

GARSUMA, *gersuma*, a rent or fine paid by the tenant to the lord of the manor.

GARTER, is the ensign of an order of knights, instituted by king *Ed.* 3. The word is also understood of the principal king at arms, attending upon the knights thereof, created by king *Hen.* 5.

GARTH, a small inclosure; so a *fishgarth* is a place inclosed for the taking of fish.

GAVEL, *gabel*, Sax. a tax or tribute.

GAVELKIND, from the Saxon *gyfe-eal-kyn*, given to all the kindred, was a tenure or custom annexed and belonging to lands in *Kent*, *Wales*, and other places, which received not the laws of the Conqueror; whereby the lands of the father

father were equally divided at his death among all his sons; and, in more ancient times still, amongst all the children male and female. But now all, or most of these lands, both in *Kent* and *Wales*, are by several acts of parliament disgavelled, and made descensible according to the course of the common laws.

Mr. *Selden* was of opinion, that gavelkind, before the *Norman* conquest, was the general custom of the realm.

One property of gavelkind was, that it did not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plough."

GAVELMAN, a tenant liable to tribute; so gavelmed, a service of mowing the lord's meadow.

GELD, (*geldum*,) a fine or compensation for an offence. Hence in our ancient laws, *weregeld* was used for the value or price of a man slain, and *orfgeld* of a beast. It also signifies rent, money, or tribute; so, in many ancient charters, there are immunities granted from *geld*, and *danegeld*, and *borngeld*, and many such like. So *neatgeld* was a rent paid in cattle; *angeld* was the single value of a thing; *twigeld*, double value; and so of the rest.

GEMOTE, Sax. an assembly. So *wittena gemote* was an assembly of wisemen, the parliament.

GENERALE, the single commons, or ordinary provision in the religious houses, being their *general* allowance, distinguished from their *pietantia*, which were pittances added on extraordinary occasions.

GENERAL ISSUE, is that which traverses and denies at once the whole declaration, without offering any *special matter* whereby to evade it: and it is called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, it amounts at once to an issue; that is, a fact affirmed one side, and denied on the other.
3 *Black.* 305.

GENTLEMAN, according to *Sir Edward Coke*, is one who bears coat armour, the grant of which adds gentility to a man's family. 2 *Inst.* 667.

But in modern acceptation, the name is not tied up to so much strictness; and *Sir Thomas Smith's* description of a gentleman seems to come much nearer to the matter; who says,—As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. 1 *Black.* 406.

GENTLEWOMAN, is a good addition of the state and degree of a woman, as gentleman is for that of a man; and if a gentlewoman be named spinster in any original writ or indictment, she may abate and quash the same; for she hath as good a right to that addition as baroness, viscountess, marchioness, or duchess, have to theirs. 2 *Inst.* 667.

A GIFT of chattels personal is the act of transferring the right and the possession of them; whereby one man renounces, and another immediately acquires, all title and interest therein. 2 *Black.* 440.

This may be done either in writing, or by word of mouth attested by sufficient evidence, of which the delivery of *possession* is the strongest and most essential. *Ibid.*

For a parol gift, without some act of delivery, will not alter the property. *Str.* 955.

A free gift is good, without a consideration; as if a man gives to another 100*l.* or a flock of sheep, and puts him in possession of them immediately, this is a gift executed, and it is not in the donor's power to retract it: but if it doth not take effect by delivery of immediate possession, it is not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration. 2 *Black.* 441.

A general gift of *all* one's goods, without any exception, even though it be by deed, is liable to suspicion as fraudulent against creditors; for by giving all a man's goods, there seems to be a secret trust and confidence implied, in favour of the donor. 3 *Co.* 80.

GUILD, a fraternity or company. See *guild*.

GIST of the action, from the French *gist* (*jacet*), is the cause for which the action *lieth*; the ground and foundation thereof, without which it is not maintainable.

GLASS. By several statutes regulations are made for the making, importing, and exporting of glass, which is to be under the management of the officers of the customs and excise. And by 24 G. 3. c. 41. every glass-maker shall take out a licence annually. And by 27 G. 3. c. 13. and 27 G. 3. c. 28. several duties are imposed on glass imported; and also on glass made in *Great-Britain*, as set forth in schedules annexed to the act.

GLEANING. It hath been said, that by the common law and custom of *England*, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass; and that this humane provision seemed borrowed from the *Mosaical* law. 3 *Black.* 212. *Bur. Mansf.* 1925.

But in the case of *Steele v. Houghton*, T. 28 G. 3. in the common pleas, it was determined, that no such right exists, nor can be claimed as part of the general common law of the land. *Blackstone's Rep.* 51.

GLEBE, is the land which belongs to a church. Glebe lands in the hands of the parson shall not pay tithes to the vicar; nor being in the hands of the vicar shall they pay tithes to the parson; for the church shall not pay tithe to the church. *Degge. p. 2. c. 2.*

If a parson lease his glebe lands, and do not also grant the tithes thereof; the tenant shall pay the tithes thereof to the parson. *Id.*

And if a parson lets his rectory, reserving the glebe lands, he shall pay the tithe thereof to his lessee. *Gibb.* 661.

If an incumbent sows the glebe land and dies, his executor or administrator shall have the crop. But if his successor be inducted before severance thereof from the ground, and before it is carried off, in this case, the successor shall not have the tithe; because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. 1 *Roll's Abr.* 655.

GLOVES. By the 25 G. 3. c. 55. duties are imposed upon gloves, and on licences to be taken out by dealers therein.

GODBOTE, Sax. an ecclesiastical fine, paid for offences against religion.

GODGILD, a tribute or offering to *God* or his service.

GOOD BEHAVIOUR. Surety of good behaviour is near of kin to surety of the peace, but is of somewhat a larger extent. A man may be compelled to find sureties both for the peace and good behaviour, and yet the good behaviour includes the peace; for he that is bound to the good behaviour is therein also bound to the peace. *Dalt.* 6. 122.

GOOD CONSIDERATION, is that of blood or natural love and affection, when a man grants an estate to a near relation; a *valuable* consideration, is that of money, marriage, or the like; which the law esteems an equivalent for the grant. 2 *Black.* 297.

GORCE, Fr. *gort*, a wear or dam whereby the passage of boats is obstructed. 1 *Inst.* 5.

GRACE. Acts of parliament for a general and free pardon, are commonly called *acts of grace*.

GRAIL, *gradale*, a *gradual* or book, containing some of the offices of the Romish church.

GRAND ASSISE, was an extraordinary trial by jury, instituted by king *Hen.* 2. by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous custom of trial by battel. For this purpose, a writ *de magna assisa eligenda* is directed to the sheriff, to return four knights, who are to chuse twelve other knights to be joined with them; and these sixteen form the grand assise, or *great jury*, to try the right between the parties. 3 *Black.* 351.

GRAND CAPE, is a writ on a plea of land, where the tenant makes default in appearance at the day given, for the king to take the land into his own hands.

GRAND JURY. The sheriff of every county is bound to return, to every commission of oyer and terminer and of gaol delivery, and to every session of the peace, 24 good and lawful

lawful men of the county, some out of every hundred, to inquire, present, do, and execute, all those things which, on the part of our lord the king, shall then and there be commanded them. They ought to be freeholders; but to what amount is not limited by law. Upon their appearance, they are sworn upon the grand jury, to the amount of 12 at the least, and not more than twenty-three, that twelve may be a majority. 4 *Black.* 302.

They are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. *Id.* 303.

GRAND LARCENY. See LARCENY.

GRAND SERJEANTY, (*serjeantia, servitium,*) is where a person holdeth his lands of the king by such services as he ought to do in person; as to carry the king's banner, or his lance, or to carry his sword before him at his coronation, or to do other like services: and it is called *grand serjeanty*, because it is a greater and more worthy service than the service in the common tenure of *escuage*. *Litt.* 153.

GRANT. A grant is the regular method, by the common law, of transferring the property of *incorporeal* hereditaments, or such things whereof no livery of seisin can be had. For which reason all *corporeal* hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, services, rents, reversions, and such like, lie *in grant*. 2 *Black.* 317.

He that granteth is termed the grantor, and he to whom the grant is made is the grantee.

The grant is usually made in these words, "have given, "granted, and confirmed:" and then, by delivery of the deed, the freehold passeth.

A grant differs from a *gift* in this; that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent. 2 *Black.* 440.

Grants may be divided, with respect to their subject matter, into grants of *chattels real*, and grants of *chattels personal*. *Ibid.*

Under the head of *chattels real*, are comprehended all leases for years of land, assignments and surrender of those leases, and all other methods of conveying an estate less than freehold; and are usually expressed to be in consideration of blood, or natural affection, or of five shillings nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a pepper-corn. Any of which considerations will, in the eye of the law, convert a *gift*, if executed, into a *grant*; if not executed, into a *contract*. *Ibid.*

Grants or gifts of *chattels personal*, are the act of transferring the right and the possession of them, whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by words attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors, or others, become sufferers thereby. 2 *Black*, 441.

GREAT TITHES, are the tithes of corn, hay, and wood; all other tithes come under the denomination of small tithes.

GREE, signifies satisfaction; as to make *gree* to the parties, is to *agree* with, or satisfy them for an offence done.

GREEN CLOTH, of the *king's household*, so termed from the *green* cloth on the table, is a court of justice composed of several great officers of the king's household, to which is committed the government and oversight of the king's court, and the keeping of the peace within the verge, &c.

GREENHUE, is every thing that bears a *green* leaf within the forest, which may be covert for the deer. It sometimes signifies a payment in money, for the privilege of cutting green wood in the forest.

GREEN-WAX, is where estreats are delivered to the sheriffs, out of the *exchequer*, under the seal of that court, made in *green-wax*, to be levied in the several counties.

GRESSOM, (*ingressus*,) a rent or fine paid to the lord of the manor,

GREVE,

GREVE, Sax. *gerefa*, the same as *reve*, a word of power and authority; as *shire-gerefa*, the sheriff.

GRITH, Sax. *peace*. So *grithbreche*, breach of the peace.

GROSS, *in gross*, absolute, intire, not depending on another; as a *villein in gross*, was such a servile person as was distinct from, and not annexed to, the manor. An *advowson in gross* is spoken of in opposition to an advowson appendant, and not separated from the manor.

GROSS-BOIS, great wood, fit for timber.

GROSS, *common in*, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, and is a separate inheritance, and may be vested in one who has not any ground in the manor. 2 Black. 34.

GROUNDAGE, a custom or tribute paid for the standing of a ship in the port.

GUARDIAN. Of the several species of guardians of infants, the first are guardians by *nature*; viz. the father, and (in some cases) the mother of the child; for if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. 1 Black. 461.

There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years. And in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. *Id.*

Next are guardians *in socage*, who are called guardians by the *common law*. These take place only when the minor is intitled to some estate in lands, and then, by the common law, the guardianship devolves upon his next of kin, to whom the inheritance cannot descend. These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion so far as to chuse his own guardian. *Id.*

But

But by the 12 C. 2. c. 24. any father, under age, or of full age, may, by deed or will, dispose of the custody of his child, either born or unborn, till such child attains the age of 21 years. And this guardian is commonly called a *testamentary* guardian.

A guardian cannot make a lease of lands for longer term than until his guardianship expires; if he does, the lease is void. 2 *Wilson*. 129. 135.

The guardian ought to apply the estate in his hands to pay the debts of the infant. 1 *Cha. Ca.* 157.

He may pay off the *interest* of any *real* incumbrance, and the *principal* of a *mortgage*; but no other real incumbrance. *Prec. Cha.* 137.

The guardian, when the infant comes of age, is bound to give him an account of all that he hath transacted on his behalf. In case of large estates, it is thought prudent sometimes to apply to the court of chancery, and account annually before the officers of that court. 1 *Black.* 463.

A guardian, upon account, shall have allowance of all reasonable costs and expences in all things. And if he receives the rents and profits, and be robbed without his default or negligence, he shall be discharged thereof. 1 *Inst.* 89.

GUARDIAN OF THE SPIRITUALTIES, is he to whom the spiritual jurisdiction of any diocese is committed, during the vacancy of the see. The archbishop is guardian of the spiritualties, on the vacancy of any see within his province; but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are guardians of the spiritualties.

GUILD (from the *Saxon* *gildan*, to pay) signifies a fraternity, or company; because every one was to pay something towards the charge and support of the company. The original of these guilds and fraternities is said to be from the old *Saxon* law, by which the neighbours entered into an association, and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured; for which purpose they raised a sum of money among themselves, and put it into a common stock, whereout a pecuniary compensation was made, according to the quality of the offence committed. From whence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them; though,

though, at this day, they are a company combined together (with orders and laws made by themselves) by the king's licence. *Gilda mercatoria*, or the merchants' guild, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land within their own precinct. And *guildhalls* are the halls of those societies, where they meet and make laws for their better government.

GULES OF AUGUST, from *gula*, a *throat*, is the entrance into, or the first day of, that month.

GYPSIES (*Egyptians*) are a kind of commonwealth among themselves of wandering impostors and jugglers, who made their first appearance in *Germany* about the beginning of the sixteenth century, and have since spread themselves over all *Europe* and *Asia*. About the year 1517, when sultan *Selim* conquered *Egypt*, this people refused to submit to the Turkish yoke, and retired into the deserts, where they lived by rapine and plunder, and frequently came down into the plains of *Egypt*, committing great outrages in the towns upon the *Nile*, under the dominion of the *Turks*: but being at length subdued, and banished from *Egypt*, they dispersed themselves, in small parties, into every country in the known world; and, as they were natives of *Egypt*, a country where the occult sciences, or black art (as it was called), was supposed to have arrived to great perfection, and which, in that credulous age, was in great vogue with persons of all religions and persuasions, they found the people, wherever they came, very easily imposed on. *Mod. Univ. Hist.* vol. 43. p. 271.

In the compass of a very few years, they gained such a number of idle profelytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering, that they became troublesome, and even formidable, to most of the states of *Europe*. Hence they were expelled from *France* in the year 1560, and from *Spain* in 1591. And the government in *England* took the alarm much earlier; for, in 1530, they are described by the statute 22 H. 8. c. 10. as "outlandish people, calling themselves *Egyptians*, using no craft, or feat of merchandize, who having come into this realm, and gone
" from

“ from shire to shire, and place to place, in great company, and used great, subtil, and crafty means to deceive the people; bearing them in hand, that they, by palmestry, could tell men’s and women’s fortunes; and so, many times by craft and subtilty, have deceived the people of their money, and also have committed many heinous felonies and robberies.” Wherefore they are directed to avoid the realm, and not to return, under pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for felony, they shall not be intitled to a jury *de medietate lingue*. And afterwards, it is enacted by 1 & 2 P. & M. c. 4. and 5 El. c. 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l.*; and if the *Egyptians* themselves remain one month in this kingdom; or if any person, being 14 years old, whether a natural born subject or stranger, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain in the same one month; the same shall be felony without benefit of clergy. But it is now above a century since any persons were prosecuted for felony upon these acts; and the law now respects them chiefly as rogues and vagabonds, and they are described as such in the vagrant act of 17 G. 2. c. 5. 4 *Black.* 166.

In *Scotland* they seem to have met with some indulgence; for, in the year 1594, there is a record among the writs of privy seal, whereby king *James* the fifth charges all his sheriffs, stewards, bailies, and other officers, to be assistant to his beloved *John Faw*, lord and earl of *Little Egypt*, in the execution of justice against several of his company who had withdrawn themselves from his obedience, and prohibiting all his subjects to disturb or molest the said *John Faw*, or any of his company, in going about on their lawful business. And it is possible, that from this lord of *Little Egypt*, this kind of strolling people may have received the denomination (which they still retain) of *Fawgang*.

H A B

HABEAS CORPORA JURATORUM, is a writ to the sheriff to have the jurors before the judges at a certain day, to pass on a trial between the parties.

HABEAS CORPUS, is the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at *Westminster*, for removing prisoners from one court into another, for the more easy administration of justice.

The most efficacious of which writs, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his taking and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. It is a high prerogative writ; and, therefore, by the common law issuing out of the king's bench, not only in term time, but also during the vacation, by a *fiat* of the chief justice, or any of the judges. And the proceedings thereon are regulated by the statute 31 C. 2. c. 2. which, by way of eminence from thence, hath obtained the distinctive appellation of the *habeas corpus* act. By this act, unless the prisoner be committed for treason or felony, (or suspicion thereof,) plainly and specially expressed in the warrant of commitment, he may, in open court, the first week of the term, or first day of assize, petition to be tried; and if he shall not be indicted some time in the next term or assize after commitment, he shall, upon motion of the last day of the term or assize, be bailed, unless it appear to the judge upon oath, that the king's witnesses could not be produced within that time, and then, if he is not tried in the second term or assize, he shall be discharged.

In order to obtain an *habeas corpus*, to bring the prisoner before the court, he must first demand of the gaoler a true copy of the commitment, which the gaoler shall deliver in six hours, on pain of 100 *l.* Then application is to be made in writing to one of the courts at *Westminster*, or if out of term time, to the lord chancellor, or one of the judges, and a copy of the warrant of commitment delivered, or oath made that it was denied. But if he hath neglected for two terms to apply, he shall not have a *habeas corpus* granted in the vacation.

This being done, the lord chancellor or judges respectively shall grant the writ, returnable immediately; and shall indorse thereon the charges of bringing the prisoner, not exceeding 12 *d.* a mile.

Then

Then the writ shall be served on the gaoler, and the said charges tendered to him; and the prisoner shall give bond to pay the charges of carrying him back if he shall be remanded, and that he will not escape by the way.

This done, the gaoler shall, within the times respectively limited by the act, according to the respective distances, bring the body, and certify the cause of commitment. (But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed.)

If upon the return it shall appear to the said lord chancellor or judges, that the prisoner is detained on a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge, or justice of the peace, for matters for which, by law, he is not bailable, in such case he shall not be discharged.

Otherwise he shall be forthwith discharged, and shall enter into recognizance to appear on his trial; and the writ, and return thereof, and the recognizance, shall be certified into the court where the trial must be. And persons so set at large, shall not be recommitted for the same offence, unless by order of court; on pain of 500*l.* to the party grieved.

But persons charged in debt or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, is a writ that issues out of any of the courts of *Westminster-hall*, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day, and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa*,) to do and receive whatsoever the king's court shall consider in that behalf. But by the 21 *Ja. c. 23.* no such cause shall be removed, if the debt or damages do not amount to 5*l.*

HABEAS CORPUS AD PROSEQUENDUM, is a writ that issues to remove a man in order to *prosecution* and trial in the proper county or jurisdiction where the fact was committed.

HABEAS

HABEAS CORPUS AD RESPONDENDUM, is where a man hath a cause of action against one who is confined by the process of some inferior court; in which case, this writ is granted to remove the prisoner to *answer* this new action in the court above.

HABEAS CORPUS AD SATISFACIENDUM, is a writ where a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.

HABEAS CORPUS AD TESTIFICANDUM, is where a person is removed in order to give testimony in a cause depending.

HABENDUM (to have), in a deed, is to determine what estate or interest is granted by the deed, the certainty thereof, for what time, and to what use. It sometimes qualifies the estate, so that the general implication of the estate, which, by construction of law, passeth in the premises, may by the *habendum* be controlled: in which case, the *habendum* may lessen or enlarge the estate, but not totally contradict, or be repugnant to it. As if a grant be to one and the heirs of his body, to have to him and his heirs for ever, here he hath an estate tail by the grant, and by the *habendum* he hath a fee-simple expectant thereon. But if it had been in the premises to him and his heirs, to have to him for life, the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or divested by it. 2 *Black.* 298.

HABERE FACIAS SEISINAM, is a writ of execution directed to the sheriff, commanding him to give to the plaintiff possession of a freehold; if it is a chattel interest, and not a freehold, then the writ is intitled *habere facias possessionem*. 3 *Black.* 412.

In the execution of these writs, the sheriff, if needful, may take with him the power of the county, and may justify breaking open doors, if the possession be not quietly delivered; but if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door, in the name of seisin, is sufficient. *Id.*

HACHIA, a *hack*, pick, or instrument for digging.

HACKNEY COACHES AND CHAIRS. By several acts of parliament, regulations are made for licensing hackney coaches not exceeding 1000, and chairs not exceeding 400, within the bills of mortality; and the same shall be distinctly marked on each side.

And certain duties are imposed on hackney coaches and chairs, according to the time they are employed, or the distance they travel. For which, see *Burn's Just.* title *Hackney Coaches and Chairs*.

And drivers and others misbehaving, are to be punished by the commissioners and justices of the peace.

HÆRETICO COMBURENDO, is a writ that lay against an heretic, whereby the person convicted of heresy was delivered over to the secular power; and upon certificate of such conviction into the court of chancery, this writ issued to *burn* the offender. And this law continued till the latter end of the reign of king *Charles* the second, when, by the 29 C. 2. c. 9. the writ commonly called *breve de hæretico comburendo*, with all proceedings thereupon, and all punishment by death in pursuance of any ecclesiastical censures, shall be utterly taken away and abolished: provided, that this shall not extend to take away, or abridge, the ecclesiastical jurisdiction of protestant archbishops, bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions; but they may proceed to punish them by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, as they might have done before.

HAIR-POWDER is not to be mixed with alabaſter, talke, plaster of *Paris*, whiting, lime, or other thing of the like nature, under certain penalties. And by 27 G. 3. c. 13. a duty is imposed on the importation thereof. And by 26 G. 3. c. 49. a licence is to be taken out by persons dealing in perfumed hair-powder. And a duty is also laid upon all perfumed hair-powder according to the value thereof.

HALF BLOOD, is where brothers or sisters do not descend from the same couple of ancestors; as where a man marries

marries a woman, and hath issue by her a son; and the wife dying, he marries another woman, by whom he hath also a son; now these two sons, though they are called brothers, are but brothers of the half blood, because they had not both one father and mother: and therefore by law, they cannot be heirs to one another; for he that claims as heir to another by descent, must be of the whole blood to him from whom he claimeth; and if there be no heir of the whole blood, the land shall escheat.

But, with respect to personal estate, the law is otherwise; for the statute of distribution, 22 & 23 C. 2. c. 10. requiring an intestate's estate to be divided amongst every of the next of kindred in equal degree; and brothers and sisters of the half blood, being in the same degree of kindred with brothers and sisters of the whole blood, the half blood are allowed by our law to come in for an equal share.

HALFENDEAL, the moiety or *half* of a thing; as *farding-deal* is a quarter or fourth part.

HALL, (Sax. *heal*,) signified anciently a manor-house or habitation, and is still in use to denote the mansion-house belonging to any person of superior rank; so also, it denotes the place of meeting of a town corporate, as the *Guildhall* in *London*.

HALLAGE, toll paid for goods or merchandize sold in a *hall*; and particularly hath been applied to a fee or toll due for cloth brought for sale to *Blackwell-hall* in *London*.

HALLMOTE, or *balimote*, (Sax. *heal*, and *gemote*, an assembly,) was particularly applied to the lord's court within the manor, called the court baron.

HALY-MOTE, an holy or ecclesiastical court. So *holy-workfolk* (holy-workfolk) were tenants who held their lands by the service of keeping in repair an ile in a church, a sepulchre, or the like.

HAM, a Saxon word, signifying a *home* or place of dwelling, as *Brigham*, *Petersham*, *Deerham*. So *hamlet* is a little village or place of habitation.

HAMBLING of dogs, an ancient term used by foresters for expeditating.

HAMESECKEN, by our ancient law, is a name for burglary, as it is in *Scotland* to this day. 4 *Black.* 223. Lords of manors had many of them privileges granted of punishing offences of this kind; and a grant of freedom from *hamsecken*, or *hamfoken*, was to be free of amercements for the like offences.

HANAPER OFFICE, in the court of chancery, is that out of which issue all original writs that pass under the great seal, and all commissions of charitable uses, sewers, bankrupts, idiocy, lunacy, and such like. These writs, relating to the business of the subject, and the returns to them, were originally kept in a *bamper*, in *hanaperio*; the other writs (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva бага*; and thence hath arisen the distinction of the *hanaper* office, and *petty-bag* office; both of which belong to the common law court in chancery. 3 *Black.* 48.

HANDHABEND, is where a thief is caught in the very fact, having the goods stolen in his *hand*. The like was anciently called *backberend*, as a bundle or fardell at his back; which *Bracton* useth for manifest theft, and so doth *Britton*. 2 *Inst.* 188.

HANDSALE, is a selling by mutual shaking of *hands*; which ceremony, among all the northern nations, was anciently held necessary in order to bind the bargain: a custom which we still retain in many verbal contracts.

HANGWITE, is said to be a forfeiture anciently claimed by lords of manors, for one who hangs himself within the lord's fee.

HARES. Besides the general penalties for destroying the game, it is enacted by the 13 *G. 3. c. 80.* that if any person shall kill or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill or destroy any hare in the night time, or on a *Sunday* or *Christmas-day*, he shall forfeit, for the first offence, not less than 10*l.* nor exceeding 20*l.*; for the second offence, 20*l.*, and not exceeding 30*l.*:
for

for the third offence, 50*l.* And on non-payment, he shall be imprisoned, for certain limited times respectively according to the several offences.

HARE HARRON, an outcry after felons and malefactors.

HART, is a stag or male deer of the forest, of five years old complete.

HATS. By 24 *G. 3. c. 51*: all retailers of hats shall take out a licence annually. And certain duties are also imposed on all hats which shall be sold, according to their value. And by 27 *G. 3. c. 13*. a duty is to be paid for all hats imported, and drawbacks are to be allowed on hats ported.

HAUGH, a great plot in a valley.

HAWKERS, by the statute 25 *H. 8. c. 9*. were described to be deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandize, which ought to be sold in open market: and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it.

By 9 & 10 *W. c. 27*. and 3 & 4 *An. c. 4*. every hawker, pedlar, and petty chapman, going from town to town, or to other men's houses, carrying any goods to sell, shall pay an annual duty of 4*l.*; and if he travel with a horse or other beast of burden, he shall pay 4*l.* more: and by 29 *G. 3. c. 26*. every such person travelling on foot, or with a horse or horses, a further additional duty of 4*l.* for each year; and also 4*l.* yearly for each beast he shall so travel with. And if he trades without licence, he shall forfeit 12*l.*; and on non-payment thereof, shall be sent to the house of correction. But this shall not prohibit any person from selling acts of parliament, forms of prayer, proclamations, gazettes, almanacks, or other printed papers licensed by authority; or any fish, fruit, or victuals; nor the real maker of any goods carrying the same for sale; nor any tinker, cooper, glazier, plumber, harness mender, or any person selling woollen manufactures by wholesale: nor shall this hinder any person from selling any goods in any public fair or market.

And by 29 G. 3. c. 26. before any person shall be licensed, he shall produce a certificate, signed by the clergyman officiating within the place where he usually resides, and two reputable inhabitants of the same place, attesting that such person is of good character and reputation, and fit to be licensed.

By 9 G. 2. c. 35. if any pedlar, or other trading person, going from town to town, or other men's houses, and trading either on foot, or with any horse or otherwise, shall offer any tea to sale, although he have a permit, he shall forfeit and suffer as for running of goods in like manner as if he had a permit.

HAWKS, in ancient time, were of very great estimation, insomuch that stealing of them was made felony; and there were other severe penalties for killing, driving them out of their covert, or stealing their eggs: but since the diversion of fowling hath fallen into another channel by gunpowder and hailshot, these penalties are become obsolete.

HAY, *haia*, (Sax. *hæg*,) an hedge, or inclosure; also a net to take deer; as *deer-hay*.

HAYBOTE, an allowance to the tenant of wood sufficient for reparation of the hedges, hays, or fences.

HAY-MARKET. Carts of hay which stand to be sold in the *hay-market*, are to pay 3 *d.* per load towards repairing the street; and are not to stand loaden after 3 o'clock in the afternoon, on pain of forfeiting 5 *s.* And hay sold in *London*, &c. between the 1st of *June* and the last of *August*, being new hay, is to weigh 60 pounds a truss, and old hay, the rest of the year, 56 pounds, on the penalty of 18 *d.* a truss. 2 *W. & M. Stat. 2. c. 8.* 8 & 9 *W. 3. c. 17.* & 31 *G. 2. c. 40.*

HEADBOROUGH, is the *head* or chief man of the *borow* or pledge, and is only another name for constable.

HEALFANG, or *halsfang*, (Sax. from *heal* or *hals* the neck, and *fang* to take,) a punishment by compressing the neck (in the pillory). Sometimes it is taken for a pecuniary mulct

mulct paid to lords of manors to commute for the punishment of the pillory.

HEARSAY, is generally not to be admitted as evidence; for no evidence is to be allowed but what is upon oath; for if the first speech was without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; and, besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. But, in some cases, hearsay evidence is allowed to be admissible; as to prove who was a man's grandfather, when he married, what children he had, and the like; of which, it is not reasonable to presume that there is better evidence. So in questions of prescription, it is allowed to give hearsay evidence, in order to prove general reputation; as where the issue was of a right to a way over the plaintiff's close, the defendant was admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Evid.* III.

HEBBING WEARS, are wears or engines made or laid at *ebbing* water. So *hebbermen*, are fishers or poachers who fish at ebbing water.

HECCAGIUM, a rent paid to the lord of the fee for liberty to use *hecks* or stoppages for catching of fish.

HEDAGIUM, a toll or customary duty paid at the *hithe* or wharf for the landing of goods; immunities from the payment whereof were granted by several ancient charters.

HEDGEBOTE, an allowance to the tenant of wood sufficient for reparation of the hedges or fences.

HEDGE BREAKERS, by statute 43 *El. c. 7.* shall pay such damages as a justice of the peace shall think fit; and, on non-payment, shall be whipped. And by the 15 *C. 2. c. 2.* the constable may apprehend a person suspected, and by warrant of a justice may search his houses and other places; and if any hedgewood shall be found, and he shall

not give a good account how he came by the same, he shall be adjudged the stealer thereof.

HEIR, *hæres*, is he that succeeds by descent, in lands, tenements, and hereditaments, being an estate of inheritance: the estate must be in fee, because nothing passeth by right of inheritance, but fee; and by the common law, a man cannot be heir of goods and chattels. 1 *Inst.* 8.

A bastard born out of lawful matrimony cannot be heir; neither can a man attainted of treason or felony, whose blood is corrupted; nor an alien who was born out of the king's allegiance, and though he be made denizen by the king's letters patent, yet this shall not confer upon him a right of inheritance: but otherwise it is of a person naturalized by act of parliament. *Id.*

There is an heir *apparent*, and an heir *presumptive*. Heir *apparent* is such, whose right of inheritance is indefeasible, provided he outlives his ancestor; as the eldest son or his issue, who must by the course of the common law be heir to his father whenever he happens to die. Heir *presumptive* is such, who, if the ancestor should die immediately, would, in the present circumstances of things, be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, by the birth of a son. 2 *Black.* 208.

The heir is generally favoured by the common law, and by the courts of equity; and dubious words in a will shall be construed for the benefit of the heir.

If an executor hath assets, he is compellable in equity to redeem a mortgage for the benefit of the heir. And when the heir is sued for the debt of his ancestor, and pays it, he shall be reimbursed by the executor of the obligor, who hath personal assets. 1 *Atk.* 487.

But in an action of debt brought upon a bond against an heir, it is no good plea for the heir to say, that the executors have assets in their hands: for a creditor may sue either heir or executor, for they are both chargeable upon specialties. *Dyer.* 204.

Where a legacy is given out of a personal estate, payable at a future day, and the legatee dies before such future day, the legacy is transmissible to executors or administrators;
but

but if the legacy be charged upon land, and the legatee dies before such future day, the legacy shall sink into the inheritance for the benefit of the heir. 1 *Atk.* 555.

HEIRESS, is a female heir to a person having an estate of inheritance of lands. If there are more than one, they are called *cobeireffes*, or rather in legal expression, *cobeirs*. The offence of stealing an heiress is founded on the statute 3 *H. 7. c. 2.* which enacts, that if any man shall, for lucre, take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestor, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled; he, his procurors, and abettors, and such as knowingly receive such woman, shall be deemed principal felons: and by 39 *El. c. 9.* the benefit of clergy is taken away from the principals, procurors, and accessaries before. And it is not material, whether a woman so taken, contrary to her will, be at last married or defiled, with her own consent or not, if she were under the force at the time. 1 *Haw.* 110.

HEIR LOOMS, are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination *loom* is of *Saxon* original, in which language, it signifies a limb or member; so that an heir loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise, the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. But deer in a real authorized park, fishes in a pond, doves in a dove-house, though in themselves personal chattels, yet are so annexed to, and so necessary to the well being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase. 2 *Black.* 28.

Charters likewise, and deeds, court rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir looms, and shall not go to the executor. *Id.* 428.

By special custom also, in some places, carriages, utensils, and other household implements, may be heir looms; but such custom must be strictly proved. *Id.*

Heir looms, though they be mere chattels, cannot be devised from the heir by will. For though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate; yet, they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till after his death) shall be postponed to the custom, whereby they have already descended. *Id.* 429.

HEMP AND FLAX, are not to be watered in any river, running water, or common pond, where beasts are used to be watered, but only in ponds for that purpose; on pain of forfeiting 20s. 33 *H. 8. c. 17.*

HEORD-PENNY, *hearth-penny*, an annual tribute of one penny anciently paid out of every family to the pope at Rome; otherwise called *Romscot*, and *Peterpence*.

HERALD, *hereault*, according to *Verstegan*, is derived from *here*, an army, and *healt*, *altus*, high, or valiant, as if a man should be called the champion of the army. The function of these officers, as now exercised with us, is to denounce war, proclaim peace, and to be employed by the king in martial messages. They are examiners and judges of gentlemen's coats of arms, and preservers of genealogies; and they marshal the solemnities at the coronations of princes, and funerals of great men. The three chief of these heralds are called *kings at arms*; of whom, *Garter* is the principal, instituted by king *Hen. 5.* whose office is, to attend the knights of the *garter* at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by king *Ed. 4.* after he became duke of *Clarence* by the death of *George* his brother; whose proper office is to marshal and dispose the funerals of all the lesser nobility, knights, and esquires, on the south side of *Trent*. The third is *Norroy*, (*north roy*,) who has the like office on the north side of *Trent*. Besides these kings at arms, there are six inferior heralds, according to their original, as they were created to attend dukes and great lords in martial expeditions; that is, *York*, *Lancaster*, *Chester*, *Windfor*, *Richmond*, and

and *Somerſet*; and three heralds extraordinary; that is, *Arun-*
del, *Norfolk*, and *Nottingham*.

There is alſo *Ulſter*, king at arms, whoſe office is to attend the knights of the order of *St. Patrick* in *Ireland*, inſtituted 5th *February* 1783.

Their office in adjusting armorial enſigns, and preſerving genealogies, is now grown much into diſuſe; ſo much falſity and confuſion having crept into their records, that, though formerly ſome credit hath been paid to their testimony, yet now even their common ſeal will not be received as evidence in any court of juſtice. But their original viſitation books, compiled when progreſſes were ſolemnly and regularly made into every part of the kingdom, to inquire into the ſtate of families, and to regiſter ſuch marriages and deſcents as were verified to them upon oath, are allowed to be good evidence of pedigrees. It were to be wiſhed, that this practice of viſitation at certain periods were revived; for the failure of *inquiſitions poſt mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their uſual progreſſes, hath rendered the proof of a modern deſcent, for the recovery of an eſtate, or ſucceſſion to a title of honour, more difficult than that of an ancient. This will indeed be remedied for the future, with reſpect to claims of peerage, by a ſtanding order in the houſe of lords, 11 *May* 1767, directing the heralds to take exact accounts, and preſerve regular entries, of all peers and peerſſes of *England*, and their reſpective deſcendants; and that an exact pedigree of each peer and his family ſhall, on the day of his firſt admiſſion, be delivered to the houſe by *Garter* principal king at arms. But the general inconvenience, affecting more private ſucceſſions, ſtill continues without a remedy. 3 *Black.* 105.

HERCE, *hercia*, an harrow.

HERDWIC, a grange or place for the herds of cattle.

HEREBANNUM, (from *here* an army, and *ban* an edict or proclamation,) was a mulct or fine for not going out to the field armed, upon ſummons of the lord or other ſuperior; ſo *herebode* was a bidding or calling out the tenants for that purpoſe; *herefare*, a military expedition; *heregeld*, a tribute or tax for maintenance of an army.

HERE-

HEREBERG, *Sax.* an inn. So *herbigare*, to harbour or entertain. *Herebinger*, or *harbinger*, an officer that goes before, and provides harbour or lodgings.

HEREDITAMENT, is a word of extensive signification; for it includes not only lands and tenements, but whatever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an *heir-loom*, or implement of furniture, which by custom descends to the heir together with an house, is neither land nor tenement, but a mere moveable; yet, being inheritable, is comprized under the general word hereditament. 2 *Black.* 17.

HEREMITORIUM, a solitary place of retirement for hermits. So *hermitorium*, is the chapel or place of prayer belonging to an hermitage.

HERESY, among protestants, is a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the christian faith, or, at least, of most high importance. 1 *Haw.* 3.

By the statute 9 & 10 *W. c.* 32. if any person, having been educated in, or having made profession of the christian religion, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or assert or maintain that there are more Gods than one, or shall deny the christian religion to be true, or the holy scriptures of the Old and New Testament to be of divine authority; he shall, for the first offence, be disabled to hold any office; for the second, he shall moreover be disabled to prosecute any action, or to be guardian, executor, administrator, or legatee.

HERETOCHÉ, (from the Saxon *here*, an army, and *togen*, to lead,) was the general or leader of an army. These *heretochs* were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were remarkable for their wisdom, fidelity, and valour. Their duty was, to lead and regulate the armies, with a very unlimited power, as it should seem good to them, to the honour of the crown, and benefit of the kingdom: and because of this great power, they were elected by the people in their full assembly, in the same manner as

sheriffs

sheriffs were elected; following still the old fundamental maxim of the *Saxon* constitution, that, where any officer was intrusted with such power, as, if abused, might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves. 1 *Black.* 408.

HERIOT, *herigate*, from *here*, an army, and *geat*, a march or expedition, was first paid in arms and horses; it is now by custom sometimes the best live beast which the tenant dies possessed of, sometimes the best inanimate good, under which a jewel or piece of plate may be included. 2 *Black.* 422.

This is no charge upon the lands, but merely upon the goods and chattels. Therefore if a *feme covert* dies possessed of a copyhold or other customary estate, the lord can have no heriot; for, being a married woman, she can have no lands of her own.

By the 13 *El. c. 5.* all fraudulent conveyances of goods and chattels, to defeat the lord of his heriot, shall, in that respect, be void.

A heriot is not due upon the death of *cestuy que trust*, but of him that has the legal estate. 1 *Vern.* 441.

Jointenants are only one and the same tenant in the law; and therefore the lord shall not have heriot till after the death of the last of them. *Bro. Heriot.* (Vin.)

Heriots are of two kinds; heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent, for which the lord may distrain; the latter arise upon no special reservation, but depend merely upon immemorial usage and custom. 2 *Black. Ibid.*

And for heriot *custom* the lord may seize out of the manor; because he claims it as his proper goods by the death of the tenant, which he may seize in any place where he finds it: yet hereby he is not debarred of his remedy by action. 2 *Black. Ibid.*

And if the beast be removed, the lord may have an action against him that removed it; so also, as it seemeth, against him that detaineth it. *Br. Heriot.* (Vin.)

6 *Co. 1.* *Bruerton's case.* Lord and tenant of three acres of land by homage, fealty, annual service of an hawk, and suit of court; the tenant made a feoffment in fee of one acre, the feoffee shall hold by homage, fealty, hawk, and suit of court, by the common law: for the things which cannot be divided into parts are performed by each intire. And there is

no

no diversity as to this purpose, between intire services annual, as suit, hawk, or the like, and not annual, as homage, fealty, and heriot. And as to the heriot, the statute of *quia emptores terrarum* cannot extend to intire services to hold for a part, because such services are not dividable; and, by consequence, every one shall hold by intiertie, as he shall hold by the common law.

8 Co. 104. *Talbot's case*. If the lord purchase parcel of the tenancy, the heriot service is extinct. But if the custom of the manor be, that upon the death of every tenant of the manor, that dieth seised of any land holden of the same manor, the lord shall have a heriot, although the lord purchase part of the tenancy, yet the lord shall have a heriot by the custom of the manor for the residue; for he remains tenant to the lord, and the custom extends to every tenant.

Upon the whole, the custom of the manor is the law of it in all such like cases.

HERMAPHRODITE, a person that is both man and woman. *Lit. Diſt.* And as they partake of both sexes, they may give or grant lands, or inherit as heirs to any, and shall take according to the prevailing sex. *Co. Lit.* 2. 7.

HEST, *Sax.* a command. It seems to have been applied to certain boons and services commanded by the lords to be performed by their tenants.

HIDE of land, is such a quantity as may be plowed with one plough in a year; or as much as may maintain one family. It contains no determinate number of acres 1 *Inst.* 69. *Hidage*, was a tax on every hide of land.

HIDEGELT, a mulct or fine, when a person had committed any crime for which he deserved whipping or other corporal punishment, to redeem such punishment, whereby to save his *hide* or skin.

HIGH CONSTABLE, is the same within the hundred or other large division, as the petty constable is within the township or vill; and in many cases being an officer subservient to the justices of the peace, he is commonly appointed by them and sworn in sessions.

HIGH TREASON. See TREASON.

HIGHWAY.

HIGHWAY. Of highways there are three kinds; first, a footway; secondly, a foot and horse-way, which is also a pack or drift-way; and, thirdly, a foot, horse, and cart way. 1 *Inst.* 56.

Every parish is bound of common right to keep their highways in good and sufficient repair; unless, by reason of the tenure of lands or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy, this being part of the *trinoda necessitas* to which every man's estate was subject, viz. expedition against the enemy, building of castles, and reparation of bridges; for though *bridges* only are expressed, yet the roads were always understood. 1 *Black.* 357.

The surveyors are appointed by the justices annually, whose business it is to call out the statute labour, levy compositions, and order all things relating to the repairs; and at the end of their year, they shall give account to the justices of their whole proceedings.

If the statute labour and composition money be insufficient, an assessment by order of the justices may be laid, not exceeding 9d. in the pound for any one year. And if all this shall be insufficient, yet still the parish is obliged by the common law, upon indictment, to make their roads good at all events.

And besides the method of indictment, every justice of the peace, by the statute, upon his own view, or on oath made to him by the surveyor, may make presentment of roads being out of repair; and thereupon like process shall be issued as upon indictment.

In aid of the parish, in many places, turnpikes have been erected; whereby all who pass upon, and have benefit of the road, are brought in to be contributory.

HIGHWAYMEN. By 4 & 5 *W. & M. c.* 8. a reward of 40s. is given for the apprehending and taking a *highwayman*, to be paid within a month after conviction, by the sheriff of the county.

HIGLER, a person who carries from door to door, and sells small articles by retail.

HIRING and borrowing are contracts by which a qualified property may be transferred to the hirer, or borrower; in which

which there is only this difference, that hiring is always for a price, a stipend, or additional recompence; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend, in case of hiring, either expressly agreed on by the parties, or left to be implied by law according to the value of the service. 2 *Black.* 454:

HOBLERS, light horsemen; or certain tenants bound by their tenure to maintain a light horse for discovering and giving notice of the enemy.

HOCKDAY, *hocktide*, was the second *Tuesday* after *Easter* week, commonly called *Hock Tuesday*, whereon the *English* mastered the *Danes*; which day was so remarkable in ancient times, that rents were reserved payable on that day. And in the accounts of *Magdalen* college in *Oxford*, there is a yearly allowance *pro mulieribus hockantibus*, in some of their manors in *Hampshire*, where the men on *Monday*, and the women on *Tuesday*, in merriment stopped the way with ropes, and *hocked* (houghed) or pulled passengers to them by the houghs, requesting them to give them something to be laid out in pious uses (or rather perhaps to be spent upon the occasion).

HOGENHINE, was one that came guestwise into an inn, and laid there for three nights, after which he was accounted one of the family, for whom the host was to be answerable. The first night he was *forman-night*, and reckoned as a stranger; the second night, *twa-night*, a guest; the third night, *hogen*, or *awn-kind*, one of the host's own domestics.

HOLDING OVER, is keeping possession of the land after the expiration of the term. By statute 4 *G. 2. c. 28.* if any person shall hold over after the determination of any term for life or years, and after demand made, and notice in writing given for delivering possession, he shall pay double the yearly value, to be recovered by action of debt. And by 11 *G. 2. c. 19.* if any person shall hold over, after himself hath given notice (either verbal; or in writing, *Bur. Mansf.* 1603.) to quit, he shall pay double rent; to be recovered in like manner as the single rent.

HOLME, Sax. a plain or level ground near the water side.

HOLT, Sax. a wood.

HOMAGE, *homagium*, is derived of *homo*; because when the tenant doth his service, he saith, *Jeo deveigne vostre home*, I become your man. 1 *Inst.* 64.

It is the most honourable service of reverence that a free tenant may do to his lord: for when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands extended and joined together between the hands of his lord, and shall say thus: "I become your man from this day forward, of life " and limb and earthly honour, and to you will be faithful " and loyal, and bear you faith; for the tenements that I " claim to hold of you (saying the faith that I owe unto our " sovereign lord the king): So help me God." And then the lord, so sitting, shall kiss him. *Litt.* 85.

Homage cannot be done to any but to the lord himself; but the steward of the lord's court, or bailiff, may take fealty for the lord. *Lit.* 92.

HOMAGE ANCESTREL, is where a tenant holdeth his land of his lord by homage; and the same tenant and his ancestors have holden the same land of the same lord and of his ancestors, time out of memory of man by homage, and have done to them homage. 1 *Inst.* 100.

HOMAGE JURY, is a jury in a court baron, consisting of tenants that do homage to the lord; who are to inquire and make presentments of the deaths of tenants, of surrenders, admittances, and the like.

HOMESTALL, a mansion house.

HOMICIDE, is the killing of any human creature; and is of three kinds; 1. *Justifiable*; such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any fault in himself. 2. *Excusable*; which is either by *misadventure*, where a man is doing a lawful act, without intent of hurt to another, and death

death casually ensues; or in *self-defence*, where one who hath no other possible means of preserving his life, from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. 3. *Felonious*; which is of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse; and that may be, either by killing one's self, or another person: in which latter case, if such other person is killed without malice, either express or implied in the perpetrator thereof, it is termed *manslaughter*; if with malice, it is *murder*. 4 *Black. c. 14.*

HOMINE REPLEGIANDO, is an ancient writ, which lies to replevy a man out of prison, or out of the custody of any private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned (*elongatus*); upon which a process issues, called a *capias in withernam*, to imprison the defendant himself, without bail or mainprize, till he produce the party. But this method of proceeding is now almost intirely antiquated, and superseded by the more effectual writ of *habeas corpus*. 3 *Black. 129.*

HONOUR. Before the statute of *quia emptores*, 18 *Ed. 1.* the king's greater barons, who had a large extent of territory holden under the crown, frequently granted out smaller manors to inferior persons to be holden of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord *paramount* over all these manors: and his seigniority is frequently termed an *honour*, not a *manor*, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 *Black. 91.*

HOPS. By several statutes, regulations are made for the curing of hops, which are to be under the inspection of the officers of excise.

And by the 27 *G. 3. c. 13.* a duty is imposed on all hops grown and cured in *Great Britain*; and also on hops imported; and drawbacks are allowed on the exportation thereof, as particularly set forth in schedules annexed to the said act.

HORA

HORA AURORÆ, the morning bell, or what is now called the four-o'clock bell; as the evening bell was at eight o'clock, commonly called the curfew.

HORNGELD, a geld or tax for the privilege of putting *horned* cattle into the forest. In many ancient charters, there is a grant of immunity from such tax.

HORSE RACES. By the 13 G. 2. c. 19. Whereas the great number of horse races for small prizes contributes to the encouragement of idleness, and the breed of strong and useful horses hath been thereby discouraged; it is enacted, that no plate, sum of money, or other thing, shall be run for, or advertised or proclaimed to be run for, unless the same be of the value of 50*l.* or upwards: and if any person shall enter, start, or run any horse for any prize under that value, he shall forfeit 200*l.*; and the person who printed or published any advertisement for the same, shall forfeit 100*l.*; the said penalties to be applied half to the use of the poor, and half to him that shall sue. And all sums of money paid for entrance, shall go to the second best horse. And no person shall enter, start, or run any horse for any prize, unless the said horse be his own property; nor shall any person enter and start more than one horse for one prize; on pain that every such horse (other than that which was first entered) shall be forfeited, or the value thereof.

And by 24 G. 3. c. 31. there shall be paid for every horse entered to run for a plate, prize, sum of money, or other thing, a duty of 2*l.* 2*s.* over and above all other duties: and also 2*l.* 2*s.* as the duty for one year; on the penalty of 20*l.*

HORSES. The sale of an horse in a fair or market shall not alter the property, unless the horse be shewed an hour at least in the open place where horses are usually sold; nor unless the buyer and seller go to the toll-taker or book-keeper, and with him enter the particulars of the bargain, and the colour and mark of the horse; and if the book-keeper doth not know the seller, then a voucher must be produced to testify his knowledge of the seller, and his name and place of abode. And the book-keeper shall give to the buyer a note of the particulars entered, on his paying 2*d.* for the same. But if the sale hath been regular, the owner may not have his horse again that hath been stolen, unless he pay to the purchaser

the price which he gave for him. 2 & 3 P. & M. c. 7.
31 El. c. 12.

By the statute 22 & 23 C. 2. c. 7. killing any horse in the night is felony and transportation; and maiming him makes the offender liable to treble damages.

And by 26 G. 3. c. 71. every person who shall keep any house or place for slaughtering horses, shall be licensed at the sessions, and be subject to the rules and regulations in the said act directed; and in default thereof shall be guilty of felony.

And by 24 G. 3. c. 31. 25 G. 3. c. 47. & 29 G. 3. c. 49. several duties are imposed on horses kept and used for the purpose of riding, or for drawing any carriage subject to any excise duty; the same to be paid annually, and to be under the management of the commissioners for the affairs of taxes.

And also by 24 G. 3. c. 31. every person exercising the trade of a horse dealer, shall take out a licence annually from the stamp officers.

HOSPITALARS, were an order of knights, who took their name from an *hospital* built at *Jerusalem* for the use of pilgrims coming to the Holy Land, dedicated to St. *John Baptist*. For the first business of these knights was, to provide for such pilgrims at that hospital, and to protect them from injuries and insults upon the road. They were instituted about the year 1092, and soon after came into *England*, and had an house built for them in *London* in the year 1100. In process of time they obtained so great honours, that their superior here in *England* was the first lay baron, and had a seat amongst the lords in parliament. They were at first called knights of St. *John of Jerusalem*; but settling chiefly at *Rhodes*, they were afterwards called knights of *Rhodes*; and after the loss of *Rhodes* in the year 1522, and their having the island of *Malta* given to them by the emperor *Charles the fifth*, they obtained the name of knights of *Malta*.

HOSPITALS, (from *hospes*, an host,) were originally founded in this kingdom for the relief and entertainment of travellers upon the road, and particularly of pilgrims, and therefore were generally built by the way side: but of later times

times they have been founded for fixed inhabitants, subject to infirmities and maladies of divers kinds, according to the discretion and order of the founders.

HOTCHPOT, according to *Littleton*, signifies a pudding; for in a pudding (he says) is not commonly put one thing alone, but one thing with other things together; and it was used metaphorically to express the putting and mixing together lands given in frank marriage, and then dividing the same equally among all the daughters. As if a man be seised of thirty acres of land, and hath issue two daughters; one of the daughters marries, and the father gives ten acres of the thirty to the husband with the daughter in frank marriage, and dies seised of the remaining twenty acres; then the other sister shall enter into the said twenty acres, and occupy them to her own use, unless the husband and his wife will put the ten acres given to them in frank marriage, with the twenty acres in hotchpot: in which case, the husband and wife shall have, besides the ten acres given to them in frank marriage, five acres in severalty of the twenty acres, and the other sister shall have the remaining fifteen acres for her purparty; so as upon the whole their shares of the father's estate shall be equal. *Litt.* 267, 8.

And by the statute of distribution of intestates effects, 22 & 23 C. 2. c. 10. the equity of this provision is transferred to the personal estate of the deceased; which enacts, that no child of the intestate, (except his heir at law,) upon which child he settled in his life-time any estate in lands, or pecuniary portion, shall have any distributive share of the personalty, unless such child will bring his said advancement into hotchpot with the other children, so as to make the estate of the said several children, to be equal as near as can be estimated.

HOUSE, a place of habitation or dwelling. The doors of an house may not be broken open on arreits, except for treason, felony, or breach of the peace. 2 *Hale's Hist.* 117.

For the dwelling house of a man is as his castle: therefore if thieves come to a man's house to rob or kill him, and the owner or his servants kill the thieves in defending him and his house, this is not felony, nor shall he forfeit any thing.

If a man builds his house so close to mine, that his roof overhangs my roof, and throws the water off his roof upon

mine, this is a nuisance for which an action will lie.
3 *Black.* 217.

Also if a person keep his hogs, or other offensive animals, so near the house of another, that the stench of them incommodes him, and makes the air unwholesome, this is an injury, as it tends to deprive him of the use and benefit of his house. *Id.*

A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like: for although these are lawful and necessary trades, yet they should be exercised in remote places; therefore it is an actionable nuisance. *Id.*

But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance. *Id.*

A man ought so to use his house as not to damnify his neighbour: and a man may compel another to repair his house, in several cases, by the writ *de domo reparanda*. 1 *Salk.* 360.

By 19 G. 3. c. 59. annual duties are imposed on dwelling houses inhabited, according to the yearly values thereof.

HOUSE BOTE, an allowance to the tenant of wood, sufficient for reparation of the houses and for fuel.

HOUSE OF CORRECTION. See CORRECTION.

HUE AND CRY, (*hutesum et clamor*, by hooting, or blowing a horn, and by making an outcry,) is the ancient common law process after felons, and such as have dangerously wounded any person, or assaulted any one with intent to rob him, And it hath received great countenance and authority by several acts of parliament. In any of which cases, the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to the discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons,

or

or the way they took. 5. If none of all these can be discovered, as where a robbery or burglary or other felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may happen to be useful for discovering a malefactor, which cannot at first be found out. 2 *H. H.* 100.

For the levying of hue and cry, although it is a good course to have a justice's warrant, when time will permit, in order to prevent causeless hue and cry; yet it is not necessary, nor always convenient, for the felon may escape before the warrant be obtained. And upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felon. And if the person, against whom the hue and cry is raised, be not found in the constablewick, then the constable, and also every officer to whom the hue and cry shall afterwards come, ought to give notice to every town round about him, and not to one next town only; and so from one constable to another, until the offender be found, or till they come to the sea side. And this was the law before the conquest. *Id.*

And in such cases it is needful to give notice in writing, to the pursuers, of the thing stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, or the like, and which way he is gone, if it may be: but if the person that did the fact be neither known, nor describable by his person, cloaths, or the like, yet such a hue and cry is good, and must be pursued, though no person certain can be named or described. *Id.* 103.

HUNDRED, is a district originally comprehending one hundred families; for in ancient time, for the more sure keeping of the peace, all freemen were to cast themselves into several companies, by ten in each company, and every of these ten men was to be pledge or surety for the forthcoming of his fellows; and this district was therefore called the *decennary*, at the head of which is the petty constable. Upon solemn occasions, ten of these *decennaries* assembled together; and as every decennary consisted of ten families, so these ten decennaries constituted what is now

called the *hundred*; over which the high or chief constable presides. In many cases, agreeably to the ancient institution, where an offence has been committed, and the offender escapes, the hundred by special acts of parliament is rendered liable to answer damages; as in cases of robbery; cutting river or sea-banks; cutting hop-binds; burning houses, barns, out-houses, hovels, cocks, mows, or stacks of corn, straw, hay, or wood; mines or pits of coal; destroying granaries, turnpikes, and works of navigable rivers; and divers other such like.

HUNDRED-LAGH, Sax. *laga*; the law relating to the hundred courts and matters cognizable therein.

HUNDRED-PENY, a tax or contribution collected by the sheriff, in aid of the expences of his *hundred* court or tourn.

HUNREDUM, in ancient grants, as where a privilege is granted to a man to be free from the *hundredis*, signifies that money which was paid to the sheriff towards his charges of holding the hundred courts: the same as *hundred-peny*.

HURST, *hyrst*, *berst*, Sax. a wood or grove of trees. There are many places in *England* which begin or end with this word, from the nature of their situation when they received that name.

HUS; Sax. *house*. So *husbrece*, house breaking or burglary. *Husearle*, a domestic servant in tilling the lord's lands. *Husfastne*, one that hath a fixed home or habitation, a house of his own. *Husgable*, a house rent or tax.

HUSBAND AND WIFE :

1. THE husband and wife are but one person in law; for which reason, a man cannot grant lands to his wife during the coverture, nor any estate or interest to her, nor enter into covenant with her. But he may by his deed covenant with others for her use, as for her jointure, or the like; and he may give to her by devise or will, because the devise or will doth not take effect till after his death. 1 *Inst.* 112.

2. All deeds executed by the wife, and acts done by her during her coverture, are void; except it be a fine, or the like matter of record, in which case, she must be solely and secretly

secretly examined, that it may be known whether or no her act is voluntary. 1 *Black.* 444.

3. In trials of any sort, husband and wife are not allowed to be evidence for or against each other. *Id.* 443.

But where the offence is directly against the person of the wife, this rule hath been usually dispensed with; and therefore, by the statute 3 *Hen.* 7. c. 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. *Id.*

Also, a wife may have security of the peace against her husband; so may the husband have security of the peace against his wife. *Id.* 445.

4. If a wife hath title to present to a benefice, the presentation must be by husband and wife. *Wood.* b. 2. c. 2.

5. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own. 1 *Black.* 443.

So for a trespass done by the wife, or for a scandal published by her, the action lieth against both husband and wife; and the husband is chargeable for the damages or fine, because he is party to the action and judgment; and both husband and wife may be taken in execution. 11 *Co.* 61. 1 *Wilf.* 149.

But if a wife, without her husband, be indicted of a trespass, riot, or other wrong, there the wife shall answer and be party to the judgment only, and the fine set upon her shall not be levied upon the husband; and as for imprisonment, or other corporal pain, it shall be inflicted upon the wife only, and not upon the husband for his wife's act or default. 11 *Co.* 61. *Dalt.* c. 139.

6. If a bond be given to a woman unmarried, and she afterwards marries; the husband and wife must join in the action, and both must recover; but if a bond be made to the wife subsequent to her marriage, the husband alone, without the wife, may bring the action and recover. 2 *Atk.* 208.

7. If a wife be made executrix, she cannot act therein without her husband's consent; nor can she bring an action alone, but her husband must join with her. 2 *Bac. Abr.* 378.

8. In

8. In the civil law, the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore in the ecclesiastical courts, a woman may sue and be sued without her husband. 1 *Black.* 444.

9. A wife is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband. 1 *Haw.* 2.

But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole, because of the odiousness and dangerous consequence of these crimes. *Id.*

10. The husband by marriage obtains a *freehold* in the right of his wife, if he takes a woman to wife that is seised of a freehold; and he may make a lease thereof for twenty-one years, or three lives, if it be made according to the statute of 32 *H. 8. c.* 28. 1 *Inst.* 351.

The husband also gains a *chattel real*, as a term for years, to dispose of, if he pleases, by grant or lease in her life-time, or by surviving her: otherwise it remains with the wife. And upon execution for the husband's debt, the sheriff may sell the term during the life of the wife. *Id.* 299. 351.

So the husband may assign and dispose of the wife's mortgage, whether it be a mortgage for a term of years, or a mortgage in fee. 2 *Atk.* 208.

The husband also by the marriage hath an absolute gift of all *chattels personal* in possession of the wife in her own right, whether he survives her or not. But if these chattels personal are *choses in action*; that is, things to be sued for by action; as debts by obligation, contract, or the like, the husband shall not have them, unless he and his wife recover them. 1 *Inst.* 351.

11. If rent be paid to a wife, yet the husband may recover it again; so if a legacy be bequeathed to a wife, the husband, and not the wife, must receive it. 1 *Vern.* 261.

12. By custom in *London*, a wife may carry on a separate trade; and as such, is liable to the statutes of bankruptcy, with respect to the goods in such separate

trade, with which the husband cannot intermeddle. *Bur. Mansf.* 1776.

13. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt, living the wife; for he has adopted her and her circumstances together. *1 Black.* 443.

But if the wife die, the husband shall not be charged for the debt of his wife after her death, if the creditor of the wife do not get judgment during the coverture, *9 Co.* 72.

14. The husband is bound to provide his wife necessaries; and if she contracts for them, he is obliged to pay for the same; but for any thing besides necessaries, he is not chargeable. Also, if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; at least, if the person who furnishes them is sufficiently apprized of her elopement. *1 Black.* 442.

So if the husband forbid particular persons to trust her, he shall not be chargeable: but a prohibition in general not to trust a wife, as by putting her in the Gazette, or the like, doth not amount to legal notice. *1 Ventr.* 42.

15. If a husband seised in fee or for life in right of his wife, do sow the land, and his wife dies before severance, he shall have the corn. *1 Inst.* 55.

After her death, if he hath had issue by her born alive, he shall be tenant by the curtesy of all the lands in fee-simple, or fee tail general, of which she died seised. *Litt.* 52.

And after her death, he shall have all *chattels real*, as the term of the wife, or a lease for years of the wife, and all other chattels in possession; and also, all such as are of a *mixed nature*, (partly in possession, and partly in action,) as rents in arrear, incurred before the marriage, or after: but of things merely *in action*, as of an obligation or bond to the wife, he can only claim them as administrator to his wife, if he survives her. *Wood. b. 1. c. 6.*

16. If the wife survives the husband, she shall have for her dower, the third part of all his freehold lands: so she shall have her term for years again, if he hath not altered the property during his life: so also, she shall have again all other chattels real and mixed: and so things in action, as debts, shall remain to her, if they were not recovered during the marriage. *Id.*

But

But if she elopes from her husband, and goes away with her adulterer, she shall lose her dower; unless her husband had willingly, without coercion ecclesiastical, been reconciled to her, and permitted her to cohabit with him. *1 Inst.* 32.

HUSSEL, *Sax.* the holy sacrament. So *kusseling people*, are people of age to receive the sacrament.

HYPOTHECA, a pledge, where the possession of the thing remains with the debtor.

HYTH, a wharf or little haven, whereat to lade or unlade goods.



END OF THE FIRST VOLUME.

